

# Unwinding the (Anti-)Magisterium in *Dobbs v. Jackson Women's Health*

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# Recognition of prenatal personhood

- This is what we want or should want: recognition of prenatal personhood.
- But the Supreme Court teaches that humans are not persons until born.

# Recognition of prenatal personhood

- Why prenatal personhood? Because it's true.
  1. A person is a member of the moral community.
    - A person is one to whom one's own is due as a matter of justice.
  2. A person is a "you" capable of being called by name.
  3. A person is formed in the womb before being born.
    - Annunciation and Visitation precede the Nativity.

# Recognition of prenatal personhood

- Recognition by whom?
- By the people of the United States, by the people of each State, and by government officials in all branches of government.

## *Roe v. Wade* on 14A personhood

“the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”

“Is the Supreme Court going to  
overrule *Roe v. Wade*?”

“Yes, mostly ... but ...”

“Unwinding the Anti-Magisterium”

# The Supreme Court's “(Anti-)Magisterium”

- Legal/Doctrinal v. Magisterial
- Magisterium v. (Anti-)Magisterium
  - Hero v. Anti-Hero

## Steve Smith on SCOTUS as Heroic (Anti-)Magisterium

“The Court casts itself as an institution that is opposed to and that protects its citizens against magisteria—against institutions that impose orthodoxies.”

## Three Examples from *Roe* and *Casey*

- “the mystery of human life”
- “when human life begins”
- prenatal personhood

## *“the mystery of human life”*

“At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

## “the difficult question of when life begins”

“Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.”

## *Roe* on 14A personhood

“The appellee and certain *amici* argue that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development.”

## *Roe on 14A personhood*

- Absence of caselaw defining unborn as persons within meaning of the Fourteenth Amendment.
- References elsewhere in text seem to have application only postnatally.
  - E.g., qualifications for federal office, Fugitive Slave Clause, Sections 2 and 3 of the Fourteenth Amendment.
- Abortion practices throughout much of 19<sup>th</sup> century were less restricted than they later became. (KCW Note: This part is just wrong.)

## *Roe on 14A personhood*

“the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”

## The viability line

“The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”

“in *Dobbs v. Jackson Women’s Health*”

# How to unwind the (anti-)magisterium at SCOTUS

- The Supreme Court's (anti-)magisterial pronouncements are most vulnerable when they can be pinned down into legal/doctrinal pronouncements.
- Once contained into statements about the meaning and application of federal law, the Court cannot escape its orthodoxy-announcing function.
- Conventional legal conclusions can be undermined with conventional legal argument.

# Agenda setting as a defense mechanism

- One difficulty in attacking (anti-)magisterial statements is that the Court sets the agenda.
- This agenda-setting function can be used to put certain questions off limits or to narrow the issues through “vehicle” selection.
- But just as the Court can issue (anti-)magisterial pronouncements that go beyond the legal/doctrinal matters directly at issue, so too can the Court walk back those (anti-)magisterial pronouncements regardless of whether legally/doctrinally required.

# The lengthy cert process

Sep 02 2020	DISTRIBUTED for Conference of 9/29/2020.
Sep 02 2020	Reply of petitioners Thomas Dobbs, et al. filed. (Distributed) <a href="#">Main Document</a> <a href="#">Proof of Service</a> <a href="#">Certificate of Word Count</a>
Sep 22 2020	Rescheduled.
Oct 05 2020	DISTRIBUTE
Oct 05 2020	Rescheduled
Oct 13 2020	DISTRIBUTE
Oct 14 2020	Rescheduled
Oct 22 2020	Supplementa <a href="#">Main Docum Count</a>
Oct 26 2020	DISTRIBUTE
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Oct 26 2020	Supplementa et al. filed (3 <a href="#">Main Docum Service</a>
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Dec 01 2020	Rescheduled.
Dec 07 2020	DISTRIBUTED for Confer
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Jan 04 2021	DISTRIBUTED for Confer
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Feb 12 2021	DISTRIBUTED for Conference of 2/19/2021.
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Mar 01 2021	DISTRIBUTED for Conference of 3/5/2021.
Mar 15 2021	DISTRIBUTED for Conference of 3/19/2021.
Mar 22 2021	DISTRIBUTED for Conference of 3/26/2021.
Mar 29 2021	DISTRIBUTED for Conference of 4/1/2021.
Apr 12 2021	DISTRIBUTED for Conference of 4/16/2021.
Apr 19 2021	DISTRIBUTED for Conference of 4/23/2021.
Apr 26 2021	DISTRIBUTED for Conference of 4/30/2021.
May 10 2021	DISTRIBUTED for Conference of 5/13/2021.
May 17 2021	Petition GRANTED limited to Question 1 presented by the petition.

# Question 1

## QUESTIONS PRESENTED

1. Whether all pre-viability prohibitions on elective abortions are unconstitutional.
- ~~2. Whether the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey's* "undue burden" standard or *Hellerstedt's* balancing of benefits and burdens.~~
- ~~3. Whether abortion providers have third-party standing to invalidate a law that protects women's health from the dangers of late-term abortions.~~

Are all pre-viability prohibitions on elective abortions unconstitutional?

No.

## How does this apply to Mississippi's law?

- The Mississippi law at issue in *Dobbs v. Jackson Women's Health* prohibits abortions after fifteen weeks gestational age.
- The Supreme Court is most likely to reject the constitutional challenge to this law.

## What about prenatal personhood?

- To reject the constitutional challenge to a post-15-weeks ban, the Court does not have to say anything about personhood.
- It can stay in the line-drawing business and just say that a line after 15 weeks is late enough.
- The Court does not want to do this, though; it wants to get out of the line-drawing business altogether.

## What about prenatal personhood?

- In extricating itself from the line-drawing business dealing with claims that State prohibition lines are too early, though, the Court also does not want to open federal courts to claims that State lines are too late.
- The Court does not want to adjudicate claims that state laws are insufficiently protective of prenatal human life.
- The Court does not want to admit it, but this is one big reason the Court is unlikely to affirm prenatal personhood.
  - Affirmation of Fourteenth Amendment prenatal personhood gives rise to a duty not to deny the equal protection of the laws to the unborn.

## Rational basis review to the rescue?

Because nothing in text, structure, history, or tradition makes abortion a fundamental right or denies States the power to restrict it, that “power[ ]” is “reserved to the States.” U.S. Const. amend X. Judicial review of abortion restrictions should be limited to the rational-basis review that applies to all laws. *Glucksberg*, 521 U.S. at 728. A state law restricting abortion is constitutional if it is “rationally related to legitimate government interests.” *Ibid.*

# Protection of perceived prenatal persons as a rational basis

- The state “interest” that kicks in at viability under the *Roe/Casey* regime is in the “potentiality of human life.”
- The Court in *Dobbs* should instead credit the state’s interest in protecting the unborn precisely as persons.
- The Court need not itself affirm prenatal personhood to uphold Mississippi’s law as reasonably related to a legitimate interest in protecting those that the State reasonably understands to be persons.

# Protection of perceived prenatal persons as a rational basis

- The Court should acknowledge that the detailed legislative findings made by the Mississippi legislature about fetal development by fifteen weeks' gestational age, together with social facts like sharing of 3D ultrasounds and what everyone knows about the unborn at 15 weeks' gestational age, provide a reasonable basis for protecting these babies as persons.
- The protection of the bodily integrity of persons within its jurisdiction is a duty of government.
- This law is reasonably related to the State's legitimate interest in complying with this duty to protect.

## The Bottom Line

Even if the Court does not affirm prenatal personhood, it should negate *Roe's* negation of prenatal personhood.

# “Who are we to disagree?” as an antidote to the abortion (anti-)magisterium

- Open the door to upholding more legislation based on perceived personhood.
- Take the stance that the Court lacks judicially manageable standards to replace its perception of personhood with Congress’s or state governments’ perceptions.
- Use nonjusticiability logic as an antidote to the abortion (anti-)magisterium.

# An Antiheroic Magisterium

