

# Can the US Congress Ban or Legalize Abortion?

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## Abstract

We show that the Constitution gives Congress the power to either ban abortion completely, or make it fully legal until birth. We argue that in the end Congress will have to do one or the other, if it is to be in compliance with the Constitution. And, we “pile on” by offering for Congressional consideration our thoughts as to precisely when human life begins.

## Keywords

Abortion, Dobbs Decision, US Constitution, 14<sup>th</sup> Amendment

## 1. Introduction

Shortly after the Dobbs Decision<sup>1</sup>, the Supreme Court decision that returned to “the people and their representatives” the question of banning, regulating, or permitting abortion (Block, 2021)<sup>2</sup> without limit, bills were introduced in the US Congress, some to ban abortion at any stage (except to save the life of the mother), others to regulate abortion (to ban it after 15 weeks, for example), and several to allow unrestricted abortion. The Dobbs Decision explicitly said that individual States may ban, regulate, or allow abortion. The question we address here is whether the US Congress can<sup>3</sup> do this as well as the States.

In section 2, we ask whether or not Congress may legislate on abortion. Section 3 is devoted to determining the proper role of the states concerning abortion legislation; it is nonexistent. The purpose of section 4 is to offer some evidence in support of our contention. Section 5 is given over to an analysis of pre-

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<sup>2</sup>[https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf).

<sup>3</sup>We define “abortion” as a two-stage act: first, evicting, or expelling the fetus from the womb, and, second, killing this very small person. See on this Block (2021).

<sup>3</sup>Should we have used “may” instead of the “can” that appears in the text? We think not. We define “can” to mean not only can Congress pass such a law, but we are arguing that if it follows the Constitution, the Supreme Court *must* uphold it.

cisely when human life begins. We conclude in section 6.

## 2. May Congress Legislation on Abortion?

A number of constitutional scholars, for example Professor Glenn Reynolds of the University of Tennessee at Knoxville, have claimed that Congress cannot pass a law on abortion (Reynolds, 2022). The argument is a good one. Congress has only enumerated powers, and regulating abortion is not one of them. Nowhere in the Constitution can even the word “abortion” be found. Hence, this issue is reserved to the states, e.g., to the people. We find this argument convincing: Congress, indeed, cannot<sup>4</sup> regulate abortion.

This does not mean Congress cannot totally ban or permit unlimited access to abortion. Congress was explicitly given the power to do so in two places. First, Section 5 of the 14<sup>th</sup> Amendment to the Constitution, which reads: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” Second, the key provision relevant to the abortion issue is the following passage from Section 1 of the 14<sup>th</sup> Amendment: “...nor shall any State deprive any *person* (our emphasis) of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.”

We have placed in italics the keyword: “person.” This word is central in the abortion debate. Is a fetus an “unborn child,” hence a “person” who cannot be deprived of life without due process of law, or it is merely a clump of cells, deserving no more protection than any other organ of a woman’s body? The pro-life community overwhelmingly believes the former, and the pro-choice community believes the latter (Block, 2014a, 2014b, 2018, 2021; Block & Whitehead, 2005)<sup>5</sup>.

All of this is well known. The only effect of the Dobbs Decision was to transfer the power to decide which community speaks in behalf of the “people and their representatives.”

The US Congress is the ultimate Representative of the People of the United States. According to the 14<sup>th</sup> Amendment, Congress *must* have a definition of the word “person” before it can enforce the Amendment, which it has the power to do, under Section 5<sup>6</sup>.

<sup>4</sup>In our view, the Supreme Court, if it follows the Constitution, *must* uphold either the banning or the allowing of abortion. Congress, however, cannot *regulate* abortion.

<sup>5</sup>The evictionist position is totally congruent with that of the pro-lifers, on this matter. See Block (2014a, 2014b, 2018, 2021) and Block and Whitehead (2005).

<sup>6</sup>In her hearing before becoming the latest appointed Supreme Court Justice, Ketanji Brown Jackson was asked to explain the difference between males and females. Her response what that she is not a biologist, and thus cannot answer this question. Well, someone has been a biologist, if that is what it takes to make this determination.

[https://www.google.com/search?q=ketanji+brown+i+am+not+a+biologist&sxsrf=ALiCzsbXMMqyNFnSxCO1cw88Az4gxr8fbA%3A1666926743482&ei=l0hbY4r2HMypqtsPj7WLiAo&oq=i+am+not+a+biologist&gs\\_lcp=Cgdnd3Mtd2l6EAEYBjIFCAAQgAQyBQgAEIAEMgUIABCABDIFCAAQgAQyB AgAEB4yBggAEAUQHjIGCAAQBRAeMgYIABAFEB4yBggAEAUQHjIGCAAQBRAeOgoIABBHE NYEELADOGcIABCABBANOgUIABC-GA0oECEEYAEoECEYYAFDSBFibDGDaSGgBcAF4AIABWYgB2QGSAQEzmAEAoAEByAEIwAEB&client=gws-wiz](https://www.google.com/search?q=ketanji+brown+i+am+not+a+biologist&sxsrf=ALiCzsbXMMqyNFnSxCO1cw88Az4gxr8fbA%3A1666926743482&ei=l0hbY4r2HMypqtsPj7WLiAo&oq=i+am+not+a+biologist&gs_lcp=Cgdnd3Mtd2l6EAEYBjIFCAAQgAQyBQgAEIAEMgUIABCABDIFCAAQgAQyB AgAEB4yBggAEAUQHjIGCAAQBRAeMgYIABAFEB4yBggAEAUQHjIGCAAQBRAeOgoIABBHE NYEELADOGcIABCABBANOgUIABC-GA0oECEEYAEoECEYYAFDSBFibDGDaSGgBcAF4AIABWYgB2QGSAQEzmAEAoAEByAEIwAEB&client=gws-wiz)

### 3. What Is the Proper Role of the States Concerning Abortion Legislation?

The *Dobbs Decision* (2021) itself is ambiguous as to which representatives of the people should be the ultimate “decider” as to what “person” means. In seven cases<sup>7</sup>, it implies the States should decide. In nine cases<sup>8</sup> it refers to “the people and their representatives.” So the *Dobbs Decision* apparently leaves it open which legislature should make the ultimate determination. In its first summary paragraph, the Supreme Court wrote: “We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.” (*Dobbs Decision*, 2021: p. 69) In the penultimate paragraph of *Dobbs*, the Supreme Court wrote, “The Constitution does not prohibit the citizens of each State from regulating abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.” (*Dobbs Decision*, 2021, p. 79)

We think in the end, Congress, not the States, must define the word “person.” To understand why, we must recall the status of the “unborn child” in Common Law.

### 4. Some Evidence in Support of Our Contention

First, consider *Blackstone* (1776):

“Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb. For if a woman is quick with child, and by a potion, or otherwise kills it in her womb; or if any one beats her, whereby the child in her body, and she is delivered of a dead child, this, though not murder, was by ancient law homicide, or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor”.

“An infant in ventre sa mere, or in the mother’s womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guarding assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were actually born. And in this point the civil law agrees with ours.”<sup>9</sup>

*Blackstone* (1776, footnote 18 to Book 1, Chapter 1) himself quotes the 13<sup>th</sup> century Common Law commentator *De Bracton* (1235)<sup>10</sup> in his second paragraph: “Those who are in the womb, as considered by the civil law to be in the nature of things, as they are capable of being benefited.”<sup>11</sup>

The Supreme Court in *Dobbs* agreed that “to many purposes, in reference to

<sup>7</sup>In the syllabus, twice on page 4, and on page 7. In the opinion main body, on pages 29, 31, 44, and 77.

<sup>8</sup>In the syllabus, on pages 1, 4, 5, and 7. In the main body, on pages 6, 14, 44, 69, and 79.

<sup>9</sup>*Blackstone*, Book 1, Chapter 1, pp. 129-130 of the (1775 7th edition) The first paragraph was cited on page 17 of the *Dobbs Decision*.

<sup>10</sup>The year-1235 is an estimated date.

<sup>11</sup>*Bracton* was also identified and cited on page 17 of the *Dobbs Decision*.

civil law, an infant *in ventre sa mere* is regarded as a person in being.” (*Dobbs Decision, 2021: p. 22*) In this passage, the Supreme Court pointed out that this “person in being” status was attained pre-quickening, that is, before the child started moving in its mother’s womb. The implication is that a child has a right to property at the instant of conception. The Supreme Court also cited<sup>12</sup> earlier case law affirming this status.

The crucial point is, a “baby in the womb” in one State, consists of mere “fetal cells,” in another. He can inherit property in the former State, but cannot so inherit in the latter. What happens if the testator owns property in both States?

Under Article I, Section 8 of the Constitution, it is the job of Congress to “regulate commerce...among the several States,” and to “establish uniform Laws on the subject of Bankruptcies throughout the United States.” So may the guardian of an “unborn child” in the former State institute a Bankruptcy in the latter State? May the guardian of the unborn child in the former State sell the property in the latter State and transfer the proceeds to the former State?

Clearly, Congress must decide, and deciding means that Congress must ultimately decide on what is a “person.”

Were Congress to ban abortion after conception, then abortion to save the life of the mother would still be allowed, since it is often the case that in an emergency situation, a choice must often be made if only one life can be saved. Police must on occasion decide to kill some innocent people in order to save a greater number of equally innocent people<sup>13</sup>.

Congress could also decide to permit abortion of “disabled or defective” unborn children, since this would in effect be a declaration that such unborn children were not “persons.”

Congress could also take the opposite point of view, and declare that an “unborn child” was not a “person” until it exited its mother’s womb after nine months. Congress could even define a born baby as not being a person until the child is capable of speech. Or even older, though the 26<sup>th</sup> Amendment, which defines anyone over the age of 18 to be a citizen and hence a “person,” places an upper bound to the age at which a child can be defined as an unperson.

Under the *Dobbs Decision* and the Constitution, Congress has the power to overrule the individual States on abortion, and in the end, Congress must set abortion law for the entire United States.

Let us now attempt to help Congress in this monumental decision that must, eventually, be made. There are three and only three natural choices, for when human life begins. At birth, some time during pregnancy, at the very beginning of the process. Let us consider these options in that order.

<sup>12</sup>The Supreme Court first cited Blackstone, 1, 129, which we have quoted supra. In addition, they cited *Evans*, 49 N. Y., at 89; *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *Morrow v. Scott*, 7 Ga. 535,537 (1819); *Hall v. Hancock*, 32 Mass. 255, 258 (1834); *Thellussom v. Woodford*, 4 Ves. 227, 321-322, 31 Eng. Rep. 117, 163 (1789).

<sup>13</sup>For more on this, see the “trolley problem.”

<https://www.google.com/search?q=%E2%80%9Ctrolley+problem.%E2%80%9D&oq=%E2%80%9Ctrolley+problem.%E2%80%9D&aqs=chrome..69i57j46i512j0i22i30l7.2743j0j4&sourceid=chrome&ie=UTF-8>.

## 5. When Does Human Life Begin?

Birth. We reject this notion. The baby 10 minutes before being born, and 10 minutes after he exits the womb, is very much the *same* being<sup>14</sup>. He is just as similar before and after as would be any reader of this essay, 20 minutes apart. It would be the rare commentator who would see any relevant difference, relevant to law that is, between any of us, 20 minutes after an initial inspection. So, then, what is the best way to characterize birth? “A change of address” would appear to the most accurate manner of so doing. Ten minutes ago, before birth, the babies’ address was inside his mother. Then he is born. Ten minutes now pass. Instead of still being inside of her, he has had his bottom slapped and now is in the arms of his mother. If this is not a change of address, then nothing is a change of address.

What about at some intermediate time in the midst of pregnancy? In the Jewish Talmudic tradition the mass of fetal cells becomes a human person when the heart (Kirsch, 2019) starts to beat<sup>15</sup>. This is essentially the same as the Common Law quickening Rule which we quoted from Blackstone. We respectfully reject this notion. Suppose a man is having a heart attack, and his heart has stopped beating. Is he still alive? Of course he is. If a gunman then comes along and fatally shoots him in the head, was this gunman guilty of murder, or, of pouring bullets into a dead body, surely a lesser crime? No, obviously the gunman is guilty of actual murder, despite the fact that he killed a person with no heartbeat.

In our view, the human being starts with the fertilized egg, which is to say, at the moment of conception. The sperm alone will not eventuate into a grown person, or will the egg, alone. But, when the sperm enters the egg, that resultant two celled entity most certainly will do just that. Therefore, we claim that life, personhood, and human being status, start at the earliest stage of his life, when he consists of no more than a single fertilized cell. In other words, a “person” is defined by a being’s potential, not by any achievement, like being able to speak. This follows the great physicist David Deutsch’s definition (Deutsch, 2011: p. 146) of a “person” as a “potential universal computer, constructor and explainer.” The importance of using potential rather than achieved lies in the fact that in the near future, we may see AGIs, Artificial General Intelligences, with achieved mental ability that is to human intelligence as human intelligence is to that of an amoeba. But both AGIs and humans are potential universal computers, hence persons. We don’t want superhuman intelligence deciding that we humans are not persons. Against an AGI, humans are as helpless as a baby against an abortionist’s scalpel.

## 6. Conclusion

We conclude that Congress, not the states, has the proper role in this determination, and that human life begins at the earliest stage of the fetus, when he con-

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<sup>14</sup>We do not say “person” here, in order to not bias our view.

<sup>15</sup>Then there is this other Jewish tradition, not found in the Talmud, that the fetus becomes a person only after he graduates from medical school.

sists of only two cells, intermingled: the sperm and the egg.

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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