

*Dobbs v. Jackson Women's Health Organization*: Gender Stereotypes and Assumptions in the  
Language of the Supreme Court

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## Introduction

In June of 2022, the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*. The Court received significant backlash after the publication of the *Dobbs* decision, sparking concern from a large portion of the nation. The decisions will have a serious impact on the lives and experiences of a vast population of people, including a dangerous impact on many people who can become pregnant. As of May 5, 2023, most abortions have been banned in fourteen states as a direct result of the *Dobbs* decision (The New York Times). Abortion bans and restrictions can impact people who can become pregnant directly and indirectly. Restrictions can leave OB/GYNs and other healthcare professionals unsure of how to care for patients in need of medical attention due to pregnancy (United States). Bans and restrictions also pose harm to victims of both sexual and domestic violence, especially through forcing victims who've become pregnant to continue a pregnancy (Rahman). This further extends the trauma they have experienced in their abuse. Restrictions and bans also make reproductive control within abusive relationships easier, leaving people who can become pregnant with less control (Rahman). Within the decision, misinformation and biased language is present (Center for Reproductive Rights). Misinformation within Supreme Court case decisions, such as *Dobbs*, can allow for the formation of dangerous laws, as seen through the abortion bans that have already been put in place. Misinformation and disinformation can also "influence policy makers who then use it to justify abortion bans" (Pagoto et al.). It is important for laws that impact the daily lives of all citizens to contain as little bias, assumptions, stereotypes, and misinformation as possible.

Through a textual analysis of *Dobbs v. Jackson Women's Health Organization*, this project seeks to better understand and compare the language used by the Supreme Court in the majority and dissenting opinions through a lens of gender and sexuality.

## Methodology

To better understand the biases that influence the Supreme Court, this study was conducted through a textual analysis of both the majority and dissenting opinions in *Dobbs*. The analysis identifies differences in the language used in the majority and dissenting opinions. Within this case, language is used that is medically inaccurate and includes harmful misinformation and distorted assumptions (Center for Reproductive Rights). In this analysis, language relating to assumptions on personhood, sex discrimination, and gender roles were extracted. Language relating to these constructs from the majority opinion were compared to language relating to the same constructs from the dissenting opinion. This analysis was utilized to investigate gender stereotypes and assumptions in the language of the Supreme Court which ultimately becomes codified into law.

## Research Questions

1. How does the language in *Dobbs v. Jackson Women's Health Organization* differ in the majority opinion and the dissenting opinion?
2. Why might there be such disparity in Supreme Court case justices' opinions in the *Dobbs v. Jackson Women's Health Organization*?

The majority opinion in the *Dobbs* shows biases and assumptions on personhood, sex discrimination, and gender roles that aim to impose a universal view of abortion onto all people

in the United States. The majority opinion relies on harmful stereotypes in their opinion, whereas the dissenting opinion's language does not.

## **Constructs**

In the *Dobbs* decisions and opinions, the terms discussed below allow for a better understanding of how the language of the Supreme Court shows gender stereotypes and assumptions based on several key constructs, including assumptions about pregnancy, personhood, bodily autonomy, and motherhood. The constructs researched in this textual analysis pertain to themes of personhood, sex discrimination, and gender roles. In defining the constructs below, multiple perspectives and definitions were utilized for a clearer understanding of their impact on the Court's opinions. First, the concept of personhood is the most complex to define in relation to reproduction. Perspectives from a variety of fields including philosophy, science, and religion are reviewed. Next, sex discrimination is defined in terms of how a law uniquely impacts different people based on sex. Finally, gender roles are discussed from the mid-nineteenth century to the present. A discussion on motherhood is also included, as an important assumption of gender is the role of people who can become pregnant to bear children.

### **Personhood**

A clear definition of when life begins, along with when personhood begins, has not come to one clear definition yet in history (Donovan). The question of "what is life?" is a large question that is defined differently among scholars. The clearest division in the answer to this question comes from religion and science. Religious scholars' notion of when life begins and what constitutes a person differs greatly from that of scientists and medical scholars. Other fields

such as philosophy and psychology have further input on how personhood should be defined.

Connecting all these fields into the political field to come to one clear answer of “what is *human* life?” further complicates the concept of personhood.

Definitions of personhood have been unclear throughout history and have been dependent on the region and period. According to Marc De Leeuw, who has researched the construct of personhood in relation to law, “since Roman law, the project of personhood is that of a pure legal construction. Within law, the meaning of personhood did not derive from any idea of knowledge about biological or social individuality... It was not until the influence of Christianity that the fictional person fused with a biological and unitary concept of the person” (Marc De Leeuw and Sonja Van Wichelen). Personhood has not always had a strong influence from religion.

Definitions of personhood in law have shifted over time. At some points, personhood has been more reliant on science and medicine, whereas at other points, it has been more reliant on religion, or on some combination of differing fields (Marc De Leeuw and Sonja Van Wichelen).

United States law often relies heavily on the Fourteenth Amendment when it considers legal personhood. The Fourteenth Amendment grants citizenship to all persons and provides all citizens with equal protection under the law (*US Constitution*, amend. 14). United States law often relies heavily on the Fourteenth Amendment when it considers legal personhood; however, “personhood is not a one-dimensional construct. In fact, there are different types of legal personhood, and not all of them fall within the Fourteenth Amendment” (Agostinone-Wilson).

This construct and how it is defined is divided amongst different fields, including philosophy, psychology, biology, medicine, and religion, and when combined, these field can begin to muddle a clear definition and answer to how personhood should be defined. To define the term personhood most accurately and inclusively in relation to reproductive rights and abortion law, it

is important to focus on the definition of personhood that is informed based on a combination of these fields.

When considering the definition of personhood, the concept of fetal personhood has been pushed front and center. Those who support fetal personhood laws wish to extend the rights of personhood laid out in the Constitution to apply to fetal life in the same manner as they would apply to any other individual. According to the scholar Faith Agostinone-Wilson, “what fetal personhood ideology has done is attempt to extend these same protections [from the Constitution] to fetuses, embryos, and even eggs” (Agostinone-Wilson). Currently in the United States, fetal life is not recognized as a person, as *Roe* concluded that the use of the word “person” within the Constitution implies a born person (Roberston). In states banning abortion, there has been a strong push for fetal personhood laws that would change this, with fetal personhood laws operating in 38 states (“Exploring the Impact of *Dobbs v. Jackson*”). With the overturning of *Roe*, states are open to apply such laws; however, a new constitutional amendment would need to be created in order for a fetus to be considered a constitutional person (Robertson).

Although it may seem that a biological stance to the answer of how personhood should be defined would be the most accurate, science complicates this construct when it begins to question if fetal life falls under the category of personhood in law. According to science, fetal life is indeed life with the potential to become human life; however, all life is not defined as being granted personhood, such as is the case with animals. Embryotic and fetal life also contain genetic coding which through fetal development, becomes the same genetic coding that the individual would have after birth. From a solely biological stance, early cells in pregnancy contain DNA that would classify it as a member of the *homo sapiens* species, but it does not possess qualities that differentiate it as a human; one could “accept that DNA denotes species

membership and an individual genetic code, and still believe humanity is more than the sum of our biological parts... that the embryo is alive must be beyond doubt – but what is the meaning of this *Homo sapiens* livingness?” (Furedi). The idea that human life can be defined with such small parameters, and “the notion that human life is defined by the foetus’s beating heart and DNA, a claim made by many who believe abortion is wrong, is a narrow, constricted and limiting way of looking at what life is” (Furedi). When researching the construct of personhood, any attempt at a solid definition must be reliant on more than just one field.

Another argument for when personhood begins is that this decision is one that must be made on an individual level. Because no scholars can agree clearly on when human life and personhood is said to begin, as well as the differences amongst religions, this decision is not one that can be decided by the government. In her book, *You’re the Only One I’ve Told: The Stories Behind Abortion*, Dr. Meer Shah states, “medicine can tell us when pregnancy begins and when a fetus is likely to be viable outside the womb, but the concept of life is more abstract and varies depending on an individual's belief” (Shah). Leaving this decision up to the government to decide one answer that will apply to all persons living in the United States cannot be accomplished now, because considerations on whether fetal life should be protected as a “person” under the Constitution are dependent on what aspects of life are valued as “human”. Human life has been valued much differently than any other form of life throughout much of history. Different philosophical thoughts for this have included that humans are rational, are able to value their own lives, and have some sort of specialness to them. With this, “there is a clear difference between the life of a woman – a conscious, knowing creature who is self-aware, who has hopes, ambitions, cares, and responsibilities of her own - and the life of a foetus that does not

even know that it is alive” (Furedi). Some level of consciousness and thought is often considered when attempting to define “personhood” and “human” life.

With an unclear agreement of when “personhood” begins amongst these fields, it remains important that the legal and political world does not take this question into their own hands. At a Human Life Symposium on An Interdisciplinary Approach to the Concept of a Person in March of 1982, scholars gathered to answer some of these questions as they relate to the consideration of a Human Life Amendment and Fetal Personhood Laws, which is still a very relevant conversation in the present and in relation to *Dobbs*. At this symposium, scholars of all fields gathered to share their definitions of life, as well as to speak on the impact of defining life in law. Many of the scholars “declined to express an opinion when personhood begins, maintaining that the lack of consensus on this sensitive subject argues against any legislative action at the present time” (Donovan). A Human Life Amendment or Bill would define life as beginning at conception, and therefore would require fetal life to be protected under the Fourteenth Amendment. Clifford Grobstein, a professor of biological science, argued at this symposium that “from a biologist’s perspective, personhood is not achieved at conception... a person is in part biological and in part something else... biological criteria are not enough to define personhood. Being a person involves subjective awareness, including personality, a sense of self, and consciousness” (Donovan). The consensus from this gathering of scholars concluded that the law should not define life or pass fetal personhood laws given the current lack of a shared definition of personhood. The “speakers argued that neither a constitutional amendment nor a human life bill would resolve the continuing debate over abortion, but either would create myriad complicated legal problems, have a negative impact on health care for women and fetuses, and impose one moral point of view on when life and personhood begin on the entire country at a

time when there is an undeniable lack of agreement on these issues” (Donovan). Although this symposium gathered in 1982, these issues have yet to be answered in the present, and imposing legal requirements and restrictions based on when life begins remain problematic.

Fetal personhood laws that have the potential to be enforced regardless of these open-ended questions remaining unanswered could have dangerous outcomes (Pregnancy Justice). Agostinone-Wilson believes that “there are only two outcomes of the fetal personhood movement. The first is one where the concept of citizenship becomes so broad as to be rendered null... The second outcome is one of dystopia aimed at women” (Agostinone-Wilson). If fetal life were to be extended the same rights that grown individuals are granted, the concept of what is a “person” would be forced to be expanded so greatly that it would lose some of its importance. Another result could be the valuing of fetal life above the lives of grown women. Fetal personhood and the personhood of pregnant people cannot exist at the same time, as “fetal personhood ‘fundamentally change[s] the legal rights and status of all pregnant women’ and forces them to ‘forfeit’ their own personhood once fetal persons have taken up residence inside their bodies” (Pregnancy Justice). Dr. Ghazaleh Moayedi, a board certified OB/GYN, discussed the impact of abortion restrictions in Texas in a hearing before the U.S. Judiciary, stating that, “physicians and hospitals are delaying life-saving care for critically ill pregnancy people because their pregnancy still have fetal cardiac activity” (United States). If fetal life is valued above the lives of pregnant people, it physically endangers the lives of people who are pregnant.

Some fetal personhood laws have attempted to use fetal homicide laws as a justification for granting fetuses personhood status (Agostinone-Wilson). This logic is flawed; personhood has been broken down into natural persons, who are viewed as worth of dignity for being human beings, and juridical persons, who are non-human entities who are afforded legal protections. In

the case of fetal homicide laws, where the law punishes any person (other than the mother) for the death of a fetus do so because the mother is a natural person. The fetus, “is not entitled to protections because of what it is innately. Instead, the law recognizes that there is a natural person, the mother, who has fundamental interests at stake. Her rights are invested in another entity, the fetus. The law gives that entity juridical personhood to ensure that the rights of the mother may be secure” (Agostinone-Wilson). Fetal personhood laws attempt to shift these rights, considering fetal life as natural persons and decreasing the rights of the mother. If fetal personhood laws were achieved, the mother and the fetus would be competing for rights. Those who seek this framework “seem to want to transfer all the protections of citizenship to the fetus, with all of the intrusion-orientated state functions falling to the adult woman who is carrying the fetus. The woman then serves as an appendage whose sole purpose is to absorb the trials of citizenship without question” (Agostinone-Wilson). These are some of the very real and dangerous consequences that have become more possible with the *Dobbs* decision.

There are currently many differing definitions of personhood and life. The politicalization of the construct of “personhood” to include fetal life has “manipulated the complex emotions people have about life and personhood while fearing bodily autonomy to make abortion a polarizing tool to gain and hold onto political power”; she later says, “using human lives to push a personal agenda is politics at its absolute worst” (Shah). There is currently no clear and set definition that can be agreed upon by scholars in the field of psychology, biology, or philosophy. Because of this, it is important to consider how definitions of life vary on an individual level, as well as how the law interprets personhood. Combining the ideas from these three fields, the construct of personhood will be understood for the purpose of this paper as not applicable to fetuses, given the potential harm this creates. To this paper, personhood will be defined as more

than the presence of a nervous system and brain, with legal personhood being not applicable to fetuses, due to the varying definitions among fields and disciplines.

## Sex Discrimination

The Constitution was written under the assumption that women did not have equal rights to men (Norton). The word male was not originally written into the Constitution, as it was not viewed as necessary; however, by the time of the Fourteenth Amendment, in the 1860s, women began to assume that they were included in Constitutional rights so long as the word “male” was not explicitly used. In an account by Elizabeth Cady Stanton, she stated that “a friend privy to the drafter’s deliberations on the Amendment’s second section related that “[o]ne of the committee proposed ‘persons’ instead of ‘males’” (Morais). That suggestion was met with opposition due to a growing fear that it would enfranchise women. The use of the terms “citizen” and “person” in the first section of the Fourteenth Amendment hold value, because it indicates some support of women’s rights; however, the lack of this language in the second section shows that the framers were still not willing to grant women the right to vote (Morais).

According to the Equal Protection Clause of the Fourteenth Amendment, “No State shall... deny to any person within its jurisdiction the equal protection of the laws” (*US Constitution*, amend. 14, sec. 2.). Many court cases have questioned the application of this promise and how it applies to sex-discrimination in laws, such as abortion bans. The case *Bostock v. Clayton County* helped to challenge “earlier decisions that excluded certain forms of sex discrimination, such as pregnancy discrimination and reproductive choice restrictions, from equal protection’s scope” (Cohen). The Court has generally held the stance that pregnancy and reproductive rights are excluded from sex-based Equal Protection; however, there are numerous arguments as to whether this should remain the case (*Geduldig v. Aiello*). (Gutenplan). This

decision has been challenged by feminist scholars under the arguments that since “abortion regulations apply only to women, they are a form of unconstitutional sex-based discrimination” (Cohen). Professor and activist Catharine MacKinnon furthered this argument and how it applied to abortion restrictions by stating that “forced motherhood is sex inequality” (Cohen). Beyond the national level, this same concept has become voiced on a more universal level. Based on a case from Ireland in which a pregnant woman carrying a non-viable fetus had to travel to obtain an abortion, it has become clearer that criminalizing abortion imposes an “‘existential burden’ in their mandate of continued pregnancy and birth” (Erdman). Since women are disproportionately impacted by pregnancy and no other steps have been taken to mitigate this discrepancy in the United States, the topic of reproductive rights must be acknowledged as a sex-based classification that triggers heightened constitutional scrutiny.

The major decision made in *Bostock* protects employees against workplace discrimination because of sexual orientation and/or gender identity; however, it has provided a new way to look at sex discrimination. *Bostock* redefined how sex discrimination is defined. In an article for the *Columbia Law Review Association*, author Susannah Cohen argues that,

“The trait of seeking an abortion is inextricably bound up with sex, so laws restricting access to abortion are sex discrimination. Unlike the Court’s opinion that claimed laws and actions impeding access to abortion were not sex-based, analyzing abortion regulations under *Bostock*’s definition of sex discrimination would acknowledge that these regulations target people based on a trait that is defined by sex. Such regulations would thus be subject to intermediate scrutiny.” (Cohen)

Although *Bostock* has only applied to employment discrimination, the decision has pushed the definitions of sex discrimination in law further along making scholars question whether pregnancy and reproductive rights may now be considered through the lens of sex discrimination; however, this was not applied in the *Dobbs* decision.

The importance of considering sex discrimination in laws dealing with pregnancy and reproduction is evident in medicine. Medical inaccuracies related to abortion and law directly impact women and can be threatening to their safety, which certainly shows a disparity among men and women with this issue, helping to support that abortion is an issue of sex discrimination (Pagoto et al.). Shah mentions HB 413 that was proposed in Ohio which would

“insist that doctors try to reimplant an ectopic pregnancy into the uterus. An ectopic pregnancy is when an embryo implants somewhere outside of the uterus and can potentially endanger the life of the person carrying the pregnancy. An ectopic pregnancy cannot be reimplanted – that is just scientific fact. The obsession with banning abortion and restricting access to it has become a political tool that disregards people’s health, as well as the realities of science. The patriarchy says that families should look a certain way and that is not true... The level at which these politicians are trying to fulfill their own agenda at the cost of people’s lives is truly troubling.” (Shah)

By ignoring science and medicine and proposing laws that would cause unnecessary harm to patients with ectopic pregnancies, these politicians are disregarding the health of women for their own political agendas. Denying that laws, such as HB 413 from Ohio that could have a serious harm to women if enacted, disproportionately affect women is false. This is another example of how abortion must no longer be excluded from the Equal Protection Clause.

The *Dobbs* case decision places women’s pregnancy rights and reproductive rights as a sex-neutral issue and does not consider it applicable to strict scrutiny under the issue of sex discrimination; however, as seen from a broader context of history of the United States, women’s reproductive rights have been impacted by sex discrimination (United Nations). (Hira). The Nineteenth Amendment was not added to the Constitution until 1920, 52 years after the Fourteenth Amendment was added. Although all humans are sexual beings, abortion has been labeled a “women’s issue”, disconnecting it from society as a whole, yet under the law, it is not considered an issue rooted in sex. Because of this, women in particular bear the burden of sexual policies.

It has continued to be a strategy to exclude pregnancy and reproductive rights laws from heightened scrutiny, simply because it involves characteristics unique to one sex; however, there is a deeper history that correlates reproductive rights laws with sex discrimination. The question of whether abortion should be considered a sex-based issue continues to be ignored and labeled as a unique or moral issue. As long as abortion continues to be labelled

“a ‘unique problem for women’, abortion rights will not be resolved... What is needed is to identify abortion laws – laws that treat abortion differently from other standard medical procedures, including laws codifying *Roe v. Wade* – as discrimination on the basis of pregnancy and therefore as sex discrimination, thus directly confronting the question of how the United States Constitution must respond when women are discriminated against as women.” (Butler)

The Court in *Dobbs* decided not to consider the issue of abortion as an issue correlated with one sex. To accurately address the issue of abortion in law, the Court needs to apply the Equal Protection Clause to reproductive rights and abortion. For the purpose of this paper, sex discrimination is defined under *Bostock* and laws regarding abortion should be subject to heightened scrutiny under a sex-based classification.

## Gender Roles

The role of women in relationship to society has had a major impact on shaping United States law, beginning with its influence over the Constitution. First, it is important to define the role of women in the time that the Court focuses on in their argument. In the late nineteenth and early twentieth century, gender roles and the implication of motherhood were much stricter than in the present, yet the law continues to ignore that history and use laws of that time period as a justification for the present (Linders). It is important to understand how gender roles and the construct of motherhood have shifted over time in order to develop a deeper understanding of how the laws have been written and interpreted.

Annella Linders composed a study which discusses the “abortion problem” and how it framed people who sought out abortions in the United States from 1840 to 1880. Linders argues that “in the United States the ‘frivolous wife’ became the embodiment of the new abortion problem... associating abortion with married women [and] brought motherhood to the center... abortion was construed as a direct violation of motherhood” (Linders). During society in the United States at that time, the role of women was to become mothers and bear children. Any woman who sought an abortion was viewed as a direct threat to this tradition, leading abortion to become associated with shame. According to those with the most negative views on abortion, women who sought abortions were not fulfilling their purpose in life. A woman’s primary role was viewed as motherhood. Linders continues, stating that “the ‘crisis’ facing the American population... was not only about birth rates, but also about the moral degeneration, and one of the best indicators of that degeneration was precisely women’s violation of their own ‘sacred’ role as mothers” (Linders). Some doctors even blamed abortions on education, since middle-class women were being taught things such as mathematics and music instead of motherly and household duties. As women were becoming more educated, there was more of a push to keep women in the role of a wife and mother. Such viewpoints in the late nineteenth century also framed abortion as being done only out of convenience for women (Luker) . The United States attributed the motives of women seeking abortions as “frivolous”, since they were refusing to assume their role in society by choosing not to bear children (Linders). The laws on abortion in the late nineteenth century were very dependent on the role women were expected to play in society and this stance has remained due to its influence in law and a lack of discussion on these implications.

There is a lot of negative stigma surrounding abortion due to the history it has in the United States; however, stigma does not mean it is something that should not be discussed or should be surrounded by shame. Abortion in the United States is not new; it is the gender roles that have stuck around and fogged how abortion has been viewed. Part of the issue is that the topic of abortion has been silenced for so long in the United States. Dr. Meera Shah discusses this, stating that, “the burden of breaking down stigma should not only weigh on those who have had abortions. They should not have to teach us about who they are, what their lived experiences are like, and why they have come to their decision” (Shah). It should not fall on those who have become stigmatized to convince others to treat them like humans and to view them as equal, regardless of their decisions. Dr. Shah continues by stating that, “one in four women in America has an abortion in her lifetime... abortion is very common. Not understanding how common it is has contributed to the belief that it is shameful and rare” (Shah). Abortion has been misunderstood from the nineteenth century in the United States to the present; this misunderstanding is what leads to the notion that abortion has not been acceptable overtime.

### Motherhood

Although currently most Americans, 61% as of 2022, believe abortion should be legal in all or most cases, there is an uncomfortable relationship in the United States with abortion, which may be contributed to a larger uncertainty about sexuality itself (PEW Research Center).

According to Agostinone-Wilson, part of this

“discomfort with female-driven sexuality involves society as a whole still dealing with women departing from the biologically determined role of the mother... Abortion and contraception represent the ability for women alone (not husbands, fathers, boyfriends, male family members, clergy, police, or politicians) to determine whether or not to have children, and the spacing of those children. Males do not have to be involved in the decision at all... This is simply not acceptable for the right wing who will continue to do

everything in its power to marginalize women and erode working class solidarity through reproductive control.” (Agostinone-Wilson)

When women’s primary role in a society is motherhood, it does not leave room for abortion to be discussed openly. In fact, it becomes believed that, “the default position... is that all women ‘naturally’ want to have children so something malicious and out of the ordinary must be at work if a woman seeks an abortion” (Agostinone-Wilson). The assumption that all people who can become pregnant wish to experience motherhood does not allow for real conversations on reproductive rights and abortion.

Not all people who can become pregnant wish to become pregnant, carry a child, or raise a child. Some people who cannot become pregnant wish to do all those things. Assuming that motherhood is a wish that is universal and is possible for all is a harmful stereotype that has a negative impact on laws surrounding reproductive rights.

## **Findings and Analysis**

In the *Dobbs* case, the majority opinion was written by Justice Samuel Alito, who was joined by Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barret. The dissent was written by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. After the decision became public, it received backlash from the public due to its harmful language and strong assumptions about gender and reproduction. Despite these criticisms, *Roe v. Wade* and *Planned Parenthood v. Casey* have both been overturned, and the *Dobbs* decisions currently stand. The decisions of the Court will have direct and long-lasting impacts on all people who can become pregnant in the United States.

The *Dobbs* decision is riddled with assumptions on key constructs, including personhood, sex discrimination, and gender roles. The majority and dissenting opinions of the Court represent these constructs in fundamentally different ways. First, the Court frames the complex construct of personhood as a simplistic matter, using language to suggest that there is a correct and incorrect answer to the question of what constitutes personhood and life, as well as what life should be valued above all else, whereas the dissent represents how one defines personhood as a more personal and intimate decision. Next, the Court declines to consider *Dobbs* under heightened scrutiny based on sex discrimination. The dissent explains the importance of considering the different ways in which people are impacted by laws surrounding reproductive rights, as well as how the sexes are impacted uniquely. Finally, the Court is reliant on time periods in their argument in which there were strict roles based on gender, yet the majority neglects to address this issue. The role of people who could become pregnant was heavily associated with reproduction and motherhood.

## Personhood

From the first sentence of the majority opinion, the Court depicted abortion in a fundamentally different way than the dissenting opinion based off personal opinions and inaccurate representations of science. The Court opens with, “Abortion presents a profound moral issue on which Americans hold sharply conflicting views”, representing abortion as a decision made that depicts one’s moral stance on life (*Dobbs* 1). According to the Oxford English Dictionary, moral (adj.), can be defined as “of or relating to human character or behaviour considered as good or bad; of or relating to the distinction between right and wrong, or good and evil, in relation to the actions, desires, or character of responsible human beings” (moral, adj.). Within the first five words of the Court’s opinion, the majority frames abortion as

an issue in the United States that all women must battle and decide if they will make the “right” or “wrong” choice. Abortion is a much more complex issue than the Court grants it to be in the opening lines of their opinion; there is no correct or incorrect answer as to whether a woman chooses to seek out an abortion.

The Court in the majority opinion continues using language that criticizes and stigmatizes those who seek abortion care. They describe the medical procedure of abortion as “barbaric”, “unnatural”, “demeaning to the medical profession”, “dangerous to the maternal patient”, and a “destruction of potential life” (*Dobbs* 7, 18, 37). They continue by stating that such procedures “crush and tear the unborn child” and “kills a human being”, as well as refer to fetal life and activity as an “unborn human being” (*Dobbs* 7, 29). These references are misleading and work to further stigmatize abortion. Terms such as barbaric and unnatural frame abortion as a topic that is morally wrong, leading individuals to associate people who obtain abortions negatively. These terms only hold negative connotations, leading to further stigmatizing of people who can become pregnant. Language that refers to abortion as dangerous or harmful to the pregnant person is misinformation, rather restrictions on abortion would be more harmful. It has been “estimated that eliminating abortion for 1 year would increase maternal mortality by 24% overall and 39% for Black women, simply because pregnancy has a higher fatality rate than abortion” (Pagoto et al.). Including that abortion is dangerous to a pregnant person is misleading when there is no evidence to back that it is dangerous, nor is it compared to alternatives.

The dissenting opinion in *Dobbs* uses different language in their description of abortion. Their language aligns more with the medical and scientific field and shows no opinion on a personal or religious standpoint of abortion. Instead of describing fetal life as an “unborn human being”, the dissent describes it as the “life of the fetus that may become a child” (*Dobbs* 2). They

describe the decision of abortion as one of “freedom”, “equality”, “medical”, and “the most personal of life decisions” (*Dobbs* 5, 12). These descriptors place abortion as a procedure in the medical field rather than aligning it with the personal opinions of the judges.

These references alter the image of abortion and shape how society views such large issues, such as abortion, in different ways. Certain language, including the key words and phrases listed above, in *Dobbs* are very misleading. On page 7 of the majority opinion, the Court includes the misconception that ““at 5 or 6 weeks’ gestational age an ‘unborn human being’s heart begins beating’” (*Dobbs* 7). This language misinforms the public due to the lack of evidence supporting it. The law that the Court is describing is inaccurate because at this stage in the pregnancy, a heart has not formed; the sound is not a heartbeat, but rather is electronic signals (Julia Boland, et al.). This law went against evidence-based policymaking, which is “the process of using high-quality information to inform decisions that are made about government policies”; yet the Supreme Court declined to block the bill (Bipartisan Policy Center). This language is misleading, and the neglect to block such laws allows for the continuation of bills with biased assumptions to be passed or remain.

The majority attempts to suggest that their decision is supportive of both fetal life and the life of the pregnant person equally; however, they include inaccurate representations of abortion and do not include a discussion on the dangers of pregnancy, as pointed out by the dissent. The dissent includes a common scenario, questioning if “a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment’s protection of liberty and equality?” (*Dobbs* 36). This concern is very real and with an abortion

ban, the life of the pregnant patient could be put at risk. The majority opinion's stance favors supporting fetal life, regardless of what expense it is to the pregnant person.

Personhood is a complex issue that must be defined at a personal level. The majority attempts to impose their beliefs onto the country through this decision and includes language within their argument to show that. The majority pretends to value fetal life equally to the life of the pregnant person, framing the dissent and those who support a constitutional right to abortion as lacking morals that consider fetal life valuable; however, they do not value these two lives equally, and are allowing for imposed restrictions that favor fetal life over all else.

### Sex Discrimination

In *Dobbs*, the majority opinion relies heavily on the nation's history in their decisions that abortion is not a constitutional right (*Dobbs*). They rely on the argument that abortion was not "deeply rooted in this Nation's history and tradition"; however, they neglect to discuss the broader context of the role of women in society at that point in history (*Dobbs* 5). The majority concludes that abortion is not an issue that is subject to heightened scrutiny under the Fourteenth Amendment. The dissent, however, evaluates the history of abortion in law with consideration of the Nation's long history of discrimination based on sex, arguing that "the sentiments of 1868 alone do not and cannot 'rule the present'"; they also include that "the most striking figure of the [majority] is the absence of any serious discussion' of how its ruling will affect women" (*Dobbs* 23, 37).

The majority does not consider abortion bans as an issue that has had negative consequences for people who can become pregnant throughout history. They even argue that there was "an unbroken tradition of prohibiting abortion on pain of criminal punishment [that]

persisted from the earliest days of the common law until 1973” (*Dobbs* 25). The Court does not discuss *why* abortion was prohibited at these times; it only includes the statement that it was. A Supreme Court case decision that does not take into consideration the context of historical time periods shows a decision that is riddled with assumptions that discriminate on the basis of sex. Regulations and laws controlling the reproduction of people who can become pregnant were utilized as a tool for subordinating women, especially in the latter half of the nineteenth century (Morrison). Up until 1920, women did not even hold the power to vote, let alone the ability to make informed decisions on their reproductive rights free of external pressure and influence. People who could become pregnant were not considered full-fledged members of society and were second-class citizens (Ritter).

A claim that abortion was not legal during this period needs to include an analysis of the rights of people who could become pregnant at the time. Under the assumption that abortion was not legal then, so it should not be legal now, the majority ignores the deeper question of the reason why abortion was illegal at that time period. Abortion “is an equity issue – a question of who deserves autonomy and freedom to reach their full potential” (Hira). Without complete control over reproduction, people who can become pregnant cannot be held as equals (Hira). This was the case in 1868. The Court also holds that abortion remained questionable in the legal field for over 50 years after women obtained the right to vote, in an attempt to justify their reasoning. However, this assumption does not consider the time it takes for laws to shift and adjust as the social climate of a country changes. Women obtained the right to vote in 1920; however, this does not mean that women would be held as equals from the day that the nineteenth amendment was ratified. A negative stigma that was associated with abortion due to laws created by men in previous years remained, and it took until 1973 when *Roe* was decided

for a constitutional right to abortion be held. Change, especially in law, is not instantaneous. Laws prior to the ratification of the nineteenth amendment were produced and approved solely by the male population of the United States. Without the right to vote, people who could become pregnant did not have any influence over laws that affected solely their bodies. The majority ignores this key piece of information as it weakens their argument.

For people who can become pregnant to have the ability to participate equally in society, a constitutional right to abortion must be recognized. As the dissent argues,

“the ability of women to participate equally in the life of the Nation – in all its economic, social, political, and legal aspects – has been facilitated by their ability to control their reproductive rights. Without the ability to decide whether and when to have children, women could not – in the way men took for granted – determine how they would live their lives and how they would contribute to the society around them.” (*Dobbs* 64)

Prior to *Roe* and with the decision from *Dobbs*, women are stripped of their autonomy and the ability to make decisions that impact the most serious aspects of their lives. They are denied the ability to make decisions that impact their experiences.

Although the recent Supreme Court suggested a potential for a broader understanding of sex discrimination in law that would include abortion and reproductive issues in *Bostock*, the majority declines to take this into consideration in *Dobbs*. The majority does not consider abortion an issue that should be subject to heightened scrutiny under sex discrimination. The majority states:

“a State’s regulation of abortion is not a sex-based classification and is thus not subject to the ‘heightened scrutiny’ that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other’... And as the Court has stated, the ‘goal of preventing abortion’ does not constitute ‘invidiously discriminatory animus’ against women.” (*Dobbs* 10-11)

Legal issues surrounding abortion and pregnancy have been tied to sex throughout the Nation's history (Hira). Laws restricting abortion access are a form of sex discrimination, and this case should have been argued with that history in consideration (Cohen).

The majority neglects to discuss how its decisions will impact the lived experiences of people who can become pregnant, economically, physically, and socially; however, this is noted by the dissent. The dissent states that "taking away the right to abortion... diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life" (*Dobbs* 49). The ability for people who can become pregnant to participate in society equally is dependent on their control over their own reproductive health, which shapes their lives and experiences. The dissent recognizes how limiting access to abortion impacts women in three major ways: politically, socially, and economically. The economic toll abortion bans can have on people who can become pregnant is drastic (Mount Sinai). All aspects of female reproduction such as hygiene products, medical costs associated with pregnancy, and childcare costs place an undue burden on people who can become pregnant; parents could spend between 10 and 20 percent of their annual income on medical costs accrued from pregnancy and birthing, with an average total healthcare cost of \$18,865 associated with pregnancy, childbirth, and post-partum care (Mount Sinai). (Rae et al.). The issue of abortion is particular to people who can become pregnant and allowing bans on abortion allows forced births, limiting the rights of people who can become pregnant disproportionately.

The dissent continues, stating that

"Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control... Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It

means that a majority of today's Court has wrenched this choice from women and given it to the States." (*Dobbs* 53)

The political, social, and economic status of people who can become pregnant in the United States is defined by the ability they have to control their own lives and experiences (Furedi). The rights granted to each individual person under the Constitution allows them to be able to situate themselves in the nation. Without this ability, people who can become pregnant fall behind and lose the freedom to be full-fledged members of society.

The *Dobbs* decisions must discuss the implications of removing the constitutional protections to abortion and their impact specifically on people who can become pregnant. Laws that limit and/or ban abortion do not just impact people who can become pregnant on an immediate, surface level, but they remove many rights of women. Removing a constitutional protection to abortion lowers the status of people who can become pregnant and disadvantages them politically, socially, and economically.

### Gender Roles

The majority opinion focuses a large portion of their argument on history that includes that abortion was not legal in 1868, and wide support of abortion was not present until a few years before *Roe* was decided. Gender roles and the role of women during this time period was drastically different than the present, which is noted by the dissent, yet not in the majority opinion. By relying solely on the history of criminal courts, the majority argues that because abortion was not a constitutional right prior to 1973, it still should not be a constitutional right; however, this is flawed thinking. This notion is impacted by gender biases, as it lacks any consideration of women's social status throughout the time periods it analyzes.

The majority includes many notes of the legality of abortion across states throughout the nineteenth and twentieth century. It mentions that “by the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow” (*Dobbs* 15). Although many states did not allow abortion in 1868, it is important to question why this may have been the case. Looking at the time period, gender roles were very rigid and expectations of people who could become pregnant were much different than they are today (Linders). Women’s sexuality was not an open topic during this time period, which is one of the reasons Annulla Linders points to for the reason abortion was not widely accepted, as mentioned earlier. Legalizing abortion reinforces that women are sexual beings capable of sexual lives without the wish for children at that current point in time. The role of women was to fulfill the role of a wife and a mother.

The dissent points out that the majority lacks language in their opinion that is representative of a more complete history of women’s oppression throughout the nation’s history. It includes that a woman “had no legal existence separate from her husband. Women were seen only as ‘the center of home and family life’ without ‘full and independent legal status under the Constitution’” (*Dobbs* 23). The dissenting opinion discusses the reliance of the majority on the legal status of abortion in the nineteenth century. It is not denied that abortion in many States had limits on abortion up until *Roe*; however, the dissent states that history is “convenient for the majority, but it is window dressing” (*Dobbs* 14). The dissent states facts without any context alongside them, which is misleading. The majority attempts to use the history of the legal status of abortion as a justification for the present, but the argument is incomplete without the full history; the majority cannot include the entire history of the period without weakening their argument.

The majority goes farther in their conclusion on the legality of abortion, noting the areas in which abortion was not legal up until 1973. The majority states that “for more than a century after 1868 – including ‘another half-century’ after women gained the constitutional right to vote in 1920 – it was firmly established that laws prohibiting abortion... were permissible exercises of state regulatory authority” (*Dobbs* 36). The majority attempts to frame abortion as a taboo issue that has not been supported throughout the nation’s history. The inclusion that abortion was prohibited in areas of the United States after women obtained the right to vote, is an attempt by the majority to frame abortion as an issue that is not related to women’s roles in political, social, and economic areas of life. Without full control, people who can become pregnant cannot be equal, full-fledged members of society. This logic shows assumptions and biases on the role of people who can become pregnant, and the impact gender has on lawmaking. A negative stigma surrounding the topic of abortion due to hundreds of years of oppression of people who can become pregnant through reproductive control persists and the ratification of the nineteenth amendment did not remove these assumptions and biases on the status of women overnight. A statement that abortion remained controversial for fifty years after the ratification of the nineteenth amendment is weak.

The dissent maintains the stance that history should not be the sole factor that defines the present in the context of the law. Although the history of law in the nation is important to take into consideration, there is an uncountable number of instances in which the laws of the past are unimaginable in the present, such as laws on slavery and segregation. The dissent states that

“the ratifiers – both in 1868 and when the original Constitution was approved in 1788 – did not understand women as full members of the community embraced by the phrase ‘We the People’. In 1868, the first wave of American feminists were explicitly told – of course by men – that it was not their time to seek constitutional protections... most women in 1868 also had a foreshortened view of their rights: If most men could not then

imagine giving women control over their bodies, most women could not imagine having that kind of autonomy... Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read out foundational charter as viewed at the time of ratification... it consigns women to second-class citizenship.”  
(*Dobbs* 14-15)

Expectations placed on people who can become pregnant have long lasting effects, physically, emotionally, and economically, so the negative stigma surrounding abortion has persisted (Furedi). The majority's language suggests that this is enough to remove the protection of a right to abortion from constitutional law, but negative stigma is not equivalent to genuine interests of the government.

The role of women and the expectations placed on people who can become pregnant have had long-lasting implications. Adjustments to differing gender roles and debunking myths and stereotypes that tell people how each gender “should” and “should not” act do not change overnight as the majority makes it seem is the case in reference to the Nineteenth Amendment. Not long before *Roe*, the Supreme Court even defined the role of women as “‘the center of home and family life,’ with ‘special responsibilities’ that precluded their full legal status under the Constitution” (*Dobbs* 23). Gender stereotypes and expectations are not just societal, but have been written into laws, including constitutional law not long ago. When these assumptions are written into law, they persist and have damaging consequences.

## Motherhood

A large role of people who can become pregnant in United States' history has been the expectation of women to bear children and fulfill the role of motherhood. The majority opinion excludes any conversation on the expectance of people who can become pregnant to have children and fulfill the role of motherhood, showing their bias towards the issue. There cannot be

a discussion of the right to abortion without including the long history of this expectation on women in the United States, yet the majority neglects to discuss it, as it would weaken their argument. The expectation of women during the time periods the majority reflects on was to be the center of the home and of family life. This expectation did not grant people who could become pregnant an equal status under the Constitution. The dissent includes that, “by 1992, when the Court decided *Casey*, the traditional view of a women’s role as only a wife and mother was ‘no longer consistent with our understanding of the family, the individual, or the Constitution’ (*Dobbs* 47). The Court then granted people who can become pregnant a status in the United States that was no longer dependent on the assumption of their wish to become a mother. Overruling *Casey* shows a rejection by the majority of viewing people who can become pregnant as people outside of their capacity to reproduce and bear children.

The majority does not include any discussion that includes any context of the periods in which abortion was not legal. The majority is heavily reliant on the notion that abortion was not legal in 1868; however, it does not consider the role of women in society at that time. Their opinion places women under strict gender roles that assume their capacity to reproduce as their most important role in society.

## **Discussion**

Through an analysis of the constructs of personhood, sex discrimination, and gender roles, there are clear differences present in the assumptions of the Court. The way in which the majority opinion and the dissenting opinion understand and represent personhood, sex discrimination, and gender roles in their language differ drastically. The language that is used by

the majority opinion relating to these key constructs alter the image of and shape how society views abortion. Stereotypes and assumptions that are present in the Court's opinions further stigmatize abortion. This shows the importance of the language used by the majority opinion.

Within the majority opinion, language surrounding the definitions of personhood and life were reliant on a general consensus that has not been defined yet in law. These assumptions are dangerous in law, especially at the level of the Supreme Court, as they attempt to impose one view onto a large, diverse population of people. The dissenting opinion does not rely on one definition of personhood and life. The majority also demotes women below the status of a "person" than they consider fetal life, prioritizing the fetus over the pregnant person. These assumptions by the majority are rooted in patriarchy. Debunking some of the myths perpetuated in society by patriarchy is key to dismantling these assumptions and allow them to impact people through lawmaking. The majority also ignores the issue of sex discrimination within its opinion through its claim that abortion is not deeply rooted in the Nation's history. The majority rejects considering how laws surrounding reproductive rights directly impact the sexes differently, demoting the status of people who can become pregnant. The argument of the majority opinion is heavily reliant on a time period in which people who can become pregnant were not granted full citizenship and equality. The majority uses language that defines people who can become pregnant as people who must fulfill the main role of motherhood.

The majority opinion is heavily reliant on language and information that is harmful to people that it attempts to (and often succeeds to) legislate. The dissenting opinion does not rely on these harmful stereotypes surrounding personhood, sex discrimination, and gender roles. The disparity amongst these two opinions in *Dobbs* are representative of the biases that individuals hold and show how they make their way into laws. The biases and assumptions discussed have

dangerous potential when they make their way into law. Gendered stereotypes have become so embedded in the nation, that some of this language may be subconsciously written into laws; in other scenarios, harmful language is purposefully included in laws to depict a certain picture for its viewers. In both cases, the language is there, and it allows a negative stigma to continue to be present in society.

One tool that can be utilized to debunk myths surrounding personhood, sex discrimination, and gender roles is sexuality education. With adequate sexuality education, these biases and assumptions could be broken down before they have the ability to make their way into the nation's laws. The United Nations published a global review in 2015 which included some of the benefits of comprehensive sexuality education (CSE). They found that CSE not only has an immediate and direct impact on youth who receive this education, but that it also “promotes gender equality and equitable social norms” where it has been more widely accepted (UNESCO). Long term skills are built through CSE that positively impact society in the long run and can help to dismantle these misconceptions in law.

#### Future Research

This study opens the possibility for continued research on language within laws that impact the daily experiences of people within the United States. Knowing that these assumptions and stereotypes exist and that they can lead to the making of harmful laws, it is important to work to understand *why* these assumptions and stereotypes are present in the language of law at all. As a second part of this research, it is my intention to study sex education as one factor for why assumptions and stereotypes exist in the language of lawmaking. Standards for Comprehensive Sexuality Education as laid out by the Sexuality Information and Education

Council of the United States can be utilized as a tool to dismantle and combat gender stereotypes and assumptions, preventing these myths from entering the field of law.

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