

Rejection of Prenatal Personhood



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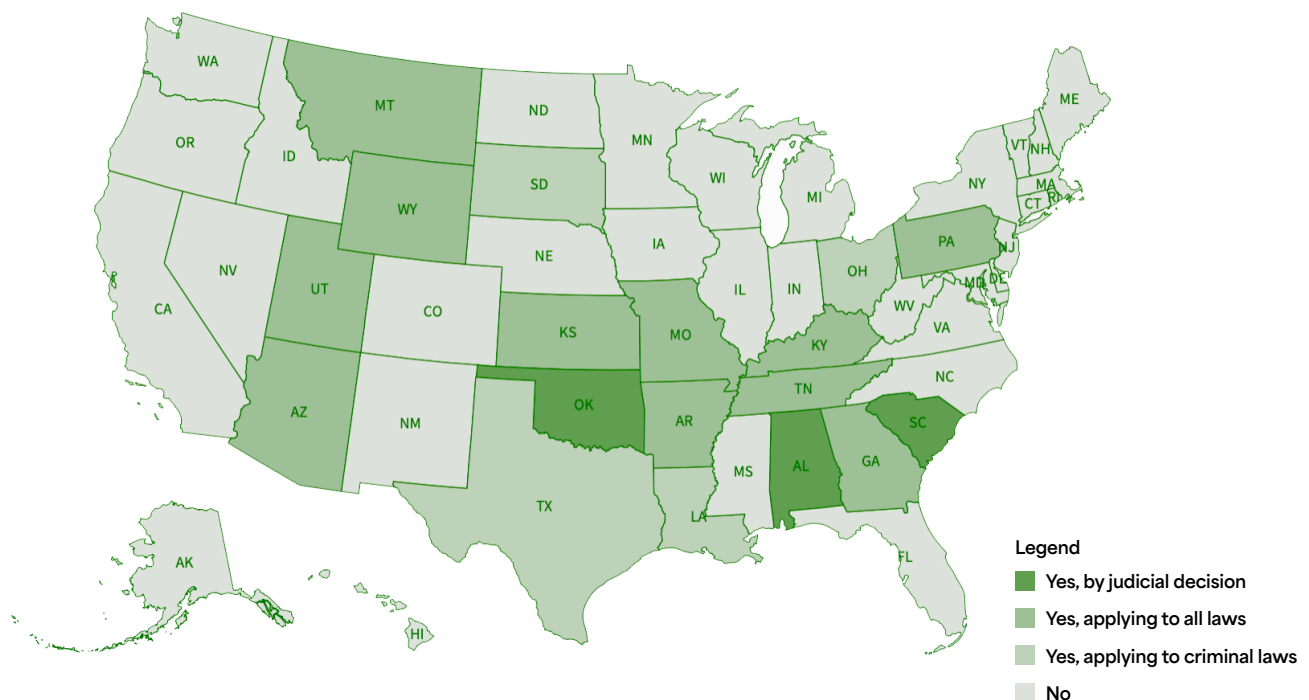
1. Introduction

Under international human rights law and the majority of legal systems worldwide, it is well established that basic legal rights accrue only when a person is born.¹ The “prenatal personhood”^{2a} (or fetal personhood) movement, conversely, conflates the value and legal status of prenatal life and seeks to extend legal rights or full personhood before birth.² Prenatal personhood measures refer to those that establish that fertilized eggs, zygotes, pre-embryos, embryos, and fetuses be treated as “persons” under the law, with rights that are equal to, or in some cases even superior to, those of born persons, particularly those of the pregnant person.³ Prenatal personhood advocates typically ground their efforts in religious, moral, or philosophical ideologies.

In the **United States**, prenatal personhood is increasingly “creeping” into the country’s legal system, particularly in recent years.⁴ While early examples of prenatal personhood in the law can be traced back to the late 1800s and early 1900s, efforts to afford prenatal life legal rights gained

momentum in the wake of the 1973 *Roe v. Wade* decision.⁵ Since then, at the federal level, lawmakers have introduced legislation seeking to establish prenatal personhood over 300 times, all of which have failed to advance or pass.⁶ Federal judges, including justices of the U.S. Supreme Court,

Image 1: U.S. States with Broad Legal Rights for Prenatal Life^b



Graphic based on Pregnancy Justice’s “Does a state have fetal personhood laws?”⁷

^a We use prenatal personhood, rather than fetal personhood, given that the laws and decisions referenced in this report extend legal rights and protections not only to fetuses, but also to zygotes, pre-embryos, and embryos.

^b The states highlighted in this image have established “fetal rights” by law or judicial decision. Additional states advance prenatal personhood in other ways through law and policy, which is discussed further in section 3.

have relied on terminology and framings that arguably legitimize the concept of prenatal personhood in various instances.⁸

Because efforts to establish legal rights for prenatal life at the federal level have largely failed, the prenatal personhood movement has turned its attention to embedding prenatal personhood in state constitutions, statutes, and judicial decisions.⁹ Currently, **17 U.S. states** have established fetal rights – either by law or judicial decision – to apply to criminal law or to both criminal and civil laws.¹⁰

The prenatal personhood movement is global in nature, with numerous jurisdictions worldwide grappling with its push to establish broad legal rights for prenatal life over the past several decades. This movement has relied on legal pathways that are strikingly similar across geographic borders – whether through constitutional amendments, legislative reform, or judicial decisions. While a handful of jurisdictions have established or expanded legal protections for prenatal life in recent years (e.g., **Honduras, Peru, and the United States**), they tend to be outliers.

Decision-makers around the world have overwhelmingly rejected the idea that embryos and fetuses have full personhood. As part of the general trend towards less formal criminalization of and increased access to abortion care around the world,¹¹ many countries have rolled back or imposed limitations on broad protections for prenatal life.

This report – through case analysis, commentary, and comparative tables – compiles and analyzes how decision-makers in various countries, as well as international human rights bodies, have pushed back against the concept of prenatal personhood. While not intended to be comprehensive, the report provides greater visibility to many of the approaches taken and arguments relied upon by actors in other parts of the world.

Part 2 provides a brief overview of critiques of prenatal personhood by scholars and experts from various disciplines.

Part 3 situates U.S. prenatal personhood in a global context, focusing on the different legal sources of prenatal personhood and trends among decision-makers' responses to efforts to advance legal rights for prenatal life.

Part 4 examines international human rights law's treatment of prenatal life, briefly laying out the normative foundation for its rejection of the idea that rights accrue before birth.

Part 5 highlights the most common legal and policy arguments that high courts in other countries and international human rights bodies use to challenge assertions of prenatal personhood.

Part 6 offers policy messages and additional resources for advocates and decision-makers in the United States seeking to integrate these arguments and approaches into their local law and policy reform efforts.

2. Cross-Disciplinary Critiques of Prenatal Personhood

Scholars and experts from various disciplines have largely rejected the concept of prenatal personhood.^c

Human rights experts have stressed that prenatal personhood has served as the justification for restrictions on sexual and reproductive health care that are “inconsistent with international law.”¹² Legally defining embryos as persons, moreover, disregards the rights to science and scientific progress, given contemporary scientific understandings of embryonic development.¹³

that fetal-protective legal frameworks often coexist with weak protections for women and children once they are born, revealing how these discourses frequently operate to reinforce patriarchal authority and control over women’s bodies and reproductive decision-making, rather than genuinely protect prenatal life.¹⁹

Experts from various disciplines have stressed that prenatal personhood generates uncertainty, undermining the effective practice of medicine. In **Mexico**, legal advocates explained that state constitutions with right to life from conception provisions led physicians to refuse to provide medically-necessary care.¹⁴ In the **United States**, public health experts have warned that the effects of prenatal personhood “create an environment of uncertainty and trepidation among patients and health care professionals – one that can reduce access to reproductive health care, increase mistrust in the health care system, and ultimately worsen health and exacerbate health inequities.”¹⁵ Similarly, according to the American College of Obstetricians and Gynecologists, prenatal personhood distorts the patient-physician relationship by requiring physicians to provide care in accordance with “legislation based on ideology rather than science, medicine, and the individual patient in front of them.”¹⁶ Moreover, defining prenatal life as legally equating to a person “leads to the criminalization of health care professionals attempting to provide evidence-based, essential health care to pregnant patients.”¹⁷

Other scholars and experts have warned that prenatal personhood affects society more broadly. Various **U.S.** scholars have characterized prenatal personhood as a tool of surveillance or an expansion of state power to control individuals.¹⁸ One comparative anthropologist has noted

^c Calls for the rejection of prenatal personhood by legal scholars and experts are included in section 5.

3. U.S. Prenatal Personhood in a Global Context

Countries around the world establish prenatal personhood through various legal sources (e.g., constitutions, statutes, judicial decisions). This section highlights some of the ways in which legal systems have extended a range of legal rights and protections to prenatal life. In particular, it systematizes the different types of constitutional and statutory provisions that either, on their face, establish legal rights and protections for prenatal life or that courts have interpreted to do so. Finally, it outlines some of the global trends related to prenatal personhood in the context of abortion care.

Table 1: Examples of Constitutional and Statutory Provisions that Advance Prenatal Personhood^d

Source of Right or Protection	Global Example	U.S. Example
Constitutional Law		
Right to life	"The right to life is inviolable from conception until death." - Art. 37 of Dominican Republic's Constitution ²⁰	
Definition of rights-holder	"...recognizes as a human person every human being since the moment of conception." - Art. 1 of El Salvador's Constitution ²¹	"Person" is defined as "every human being with a unique DNA code regardless of age, including an unborn child." - Art. I of Missouri's Constitution (proposed under S.J. Res; failed to advance) ²²
Policy statement		"The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." - 68(2) of Arkansas's Constitution ²³
Criminal Law		
Definition of rights-holder		"Person" includes "a human being from the moment of fertilization and implantation." - § 14:2 of Louisiana's Criminal Code ²⁴
Injury or death	Criminal penalty for "[a]nyone who, by any means or procedure, causes an injury or disease in a fetus that seriously impairs its normal development, or causes it a serious physical or psychological impairment." - Art. 157 of Spain's Criminal Code ²⁵	Criminal penalty for "[k]illing of unborn child by injury to mother." - § 782.09 of Florida's Criminal Code ²⁶

^d Other constitutional and statutory provisions outside the scope of this table may exist that ascribe value, rights, or protections to prenatal life and could, therefore, be weaponized to advance legal rights or protections for prenatal life. This chart also encompasses the treatment of both intrauterine and extrauterine embryos. Some states, however, distinguish between the law's treatment of intrauterine and extrauterine embryos.

Abortion prohibition	“[F]etal life begins at conception [and] deserves respect and protection.” - Hungary’s Act LXXIX on the Protection of Fetal Life²⁷	“Human being” is defined as “an individual member of the species Homo sapiens, from and after the point of conception.” - § 41-41-191 of Mississippi’s Criminal Code²⁸
Child abuse		Crime of chemical endangerment of a child is “knowingly, recklessly, or intentionally” causing or permitting “a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia.”^f - § 26-15-3.2 of Alabama’s Criminal Code²⁹
Civil Law		
Definition of rights-holder	“[C]ivil personality begins at birth; but the law protects, from conception, the rights of the unborn child.” - Title 1, Chapter 1 Art. 2 of Brazil’s Civil Code³⁰	“‘Natural person’ means any human being including an unborn child.” - § 1-2-1(b) of Georgia’s Civil Code³¹
Injury or death ^e	“At birth, a child may demand that damage suffered before birth be remedied.” - Art. 446 of Poland’s Civil Code³²	Wrongful death of minor is “[w]hen the death of a minor child is caused by the wrongful act, omission, or negligence of any person...” § 6-5-391 of Alabama’s Civil Code³³
Property or inheritance rights	A fetus has the capacity to enjoy “civil-law rights in estate succession, acceptance of gift, and other situations where protection of a fetus’ interests is involved.” However, if the fetus does not survive, its rights never existed. - Art. 16 of China’s Civil Code³⁴	“Inheritance rights will not flow to the in vitro fertilized human embryo as a juridical person, unless the in vitro fertilized human embryo develops into an unborn child that is born in a live birth, or at any other time when rights attach to an unborn child in accordance with law.” - § 9:133 of Louisiana’s Civil Code³⁵
Child abuse		“Child in need of protection” defined as “a child who...Was subject to prenatal exposure to chronic or severe use of alcohol or any controlled substance...” - § 27-20.3-01(5)(f) of North Dakota’s Civil Code³⁶
Policy statement	“The conceived individual is a subject of rights in all matters that are in their favor.” - Preamble of Peru’s Civil Code³⁷	
Children’s Codes		
Right to life	Children and adolescents have an “intrinsic right to life from conception...” - Art. 12 of Nicaragua’s Children’s Code³⁸	
Definition of rights-holder	Code recognizes and regulates children’s rights “from conception to eighteen years of age.” - Art. 3 of El Salvador’s Children’s Code³⁹	
Specific protections	Protection of the unborn occurs “through the care provided to the pregnant woman from conception until forty-five days after childbirth.” - Art. 9 of Paraguay’s Children’s Code⁴⁰	“Abuse” is defined to include “serious physical harm inflicted on the unborn child...” - § 48.02 of Wisconsin’s Children’s Code⁴¹

^e The pregnant or postpartum person is explicitly exempted in the criminal provisions included as examples here. However, there are U.S. states that fail to exempt the pregnant or postpartum person from their respective fetal homicide laws, including Michigan, Mississippi, Oklahoma, South Dakota, Utah, Virginia, and Wyoming. American Bar Association, Report and Resolution 518 (2025).

^f The Alabama Supreme Court interpreted the statute in *Ex parte Ankrom* to apply to unborn children during pregnancy.

a. Constitutional and Statutory Sources of Legal Rights and Protections for Prenatal Personhood

Relatively few constitutions around the world (19) afford constitutional rights or protections to prenatal life. Among these, three distinct approaches have emerged. In most cases, a constitution's right to life provision either explicitly encompasses prenatal life or references the need to "protect" prenatal life. Some constitutions, however, extend all constitutional rights to prenatal life by defining rights-holders to include prenatal life.^g Finally, a handful of constitutions afford rights or protections to prenatal life through other provisions, such as those governing rights of children (e.g., **Ecuador**^h and the **Philippines**ⁱ) or the right to health (e.g., **Madagascar**^j).⁴² While no U.S. state constitution defines prenatal life as a rights-holder, at least two states (i.e., **Alabama** and **Arkansas**) have added provisions articulating a state commitment to protecting prenatal life as a policy matter.⁴³

Globally, it is far more common for other areas of the law, namely criminal and civil law, to afford specific rights and protections to prenatal life. Some codes, as in the case of constitutions, can refer to prenatal life when establishing who is considered a rights-holder or the subject of rights in that entire area of the law. However, in most cases, the scope of these rights is ultimately limited, either by contingencies or carve-outs. In **Argentina**, for example, the Civil Code clearly establishes that the "existence of a human being begins at conception," but that the acquisition of legal rights is contingent upon live birth.⁴⁴ In the **United States**, similarly, definitions of crime victims that broadly include prenatal life typically exempt the pregnant or postpartum individual from prosecution.^k Finally, other jurisdictions afford prenatal life a limited set of rights, many of which are explicitly conditional upon live birth.

Criminal codes typically afford various protections to prenatal life through articles criminalizing in utero injuries, feticide, and abortion care, among other crimes. Historically, in utero injury and feticide laws have been understood to account for harms to prenatal life caused by third parties and typically include carve-outs for legal abortion care. In 2021, when one **Australian state** passed a law establishing the serious harm to or the loss of a fetus as a criminal act

separate from the crime of causing grievous bodily harm to a pregnant person, it included an explicit carve-out for voluntary terminations of pregnancy.^l ⁴⁵ Feticide laws are equally common. In the **United States**, for example, **38 states** have fetal homicide laws, which authorize homicide charges for causing pregnancy loss.⁴⁶ The majority of these states (30) similarly exclude charges against postpartum individuals for causing the loss of their own pregnancies.⁴⁷

Most countries' criminal codes include provisions prohibiting abortion care under certain circumstances, such as forced abortion or self-managed abortion. In fact, **Canada** and **South Korea** are the only countries that do not regulate abortion care to some degree using criminal law.⁴⁸ Abortion prohibitions can rely on language that enshrines various levels of protection and rights to prenatal life. In the **United States**, at least **24 states** include "fetal rights" language in laws regulating or prohibiting abortion care.⁴⁹

Civil codes in countries around the world contain provisions that allow for born infants to claim damages for injuries they suffered while in utero. While many of these laws target medical professionals whose negligence leads to fetal injuries, at least a handful (e.g., **Australia**,⁵⁰ **Canada**,⁵¹ and the **United Kingdom**⁵²) allow a child (or a party on behalf of the child) to directly sue the pregnant parent for injuries suffered in utero due to the parent's negligence, particularly in the context of motor vehicle accidents. Civil codes can also establish property and inheritance rights for prenatal life. However, these provisions typically state that property and inheritance rights of prenatal life are conditional upon the infant ultimately being born alive.

Beyond these types of provisions, in the **United States**, **24 states and D.C.** consider some substance use during pregnancy to be civil child abuse – a radical and dangerous misapplication of the law.⁵³ Several U.S. states, moreover, have incorporated, or proposed to incorporate, legal rights and protections for prenatal life into several other areas of the law, including workers' compensation (e.g., **Missouri**), tax law (e.g., **Georgia**), child support (e.g., **Kansas**), carpool lanes (e.g., **Texas**), and public benefits (e.g., **Iowa**).⁵⁴ Finally, children's codes of various countries define rights-holders to include prenatal life (e.g., **Honduras** and **Nicaragua**) or broadly establish that the definition of a "child" begins at conception (e.g., **El Salvador** and **Peru**).

^g Provisions grant prenatal life rights that, in reality, are impossible to exercise (e.g., to vote), underscoring the absurdity of taking prenatal personhood to its logical conclusion. See section 5b for additional information about how decision-makers have articulated this line of argumentation.

^h "Children and adolescents shall enjoy the rights that are common to all human beings, in addition to those that are specific to their age. The State shall recognize and guarantee life, including care and protection from the time of conception." Constitución de la República del Ecuador [Constitution] (2008, rev. 2021), art. 45 (Ec.).

ⁱ "[The State] shall equally protect the life of the mother and the life of the unborn from conception." Constitution of the Republic of the Philippines (1987), art. II sec. 12 (Phil.).

^j "The State recognizes and organizes for all individuals the right to the protection of health from their conception through the organization of free public health care..." Constitution of the Republic of Madagascar (2010), art. 19 (Madag.).

^k E.g., fetal homicide laws. American Bar Association, Report and Resolution 518 (2025).

^l "This section does not apply to— (a) anything done in the course of a medical procedure, or (b) anything done by or with the consent of the mother of the unborn child."

b. Judicial Decisions as Sources of Legal Rights and Protections for Prenatal Life

Affording legal rights or protections to prenatal life has been the subject of much debate, and high courts around the world have weighed in on several occasions. In a handful of cases, judicial decisions have played a role in establishing a right to life for prenatal life in the context of regulations involving not only abortion care, but also a range of other reproductive health services (e.g., assisted reproductive technologies and contraception). In a majority of cases, however, high courts have pushed back on affording absolute protections to prenatal life.

Even in countries with constitutions that do not reference prenatal life, several high courts have nonetheless recognized a prenatal right to life. In deciding the constitutionality of abortion decriminalization, high courts in **Germany** (1993) and **South Korea** (2019) established a right to life for prenatal life – even while upholding the constitutionality of laws permitting abortion care through the 12th and 22nd weeks of pregnancy, respectively.⁵⁵ **Poland's** Constitutional Court reached a similar result in a 1997 decision. When the legislature sought to amend the “right to life” provision of the Family Planning Act as part of a broader decriminalization effort,^m anti-abortion advocates challenged the reform. In its decision, the Court held that the amendment did not change the broad rights and protections afforded prenatal life and that prenatal life “must be covered by constitutional protection.”⁵⁶ It also extended new constitutional protections to prenatal life – particularly under its rights to family and health – and characterized the fetus as a rights-holder under civil law, entitled to claim damages for in utero injuries and to property.⁵⁷

In **Costa Rica**, prenatal personhood advocates challenged a Costa Rican law authorizing and regulating the practice of in vitro fertilization (IVF) in 1995, arguing that the destruction of embryos associated with the process violated the Constitution. In a decision that will be discussed further in section 4c, the Supreme Court’s Constitutional Chamber ultimately ruled that the IVF law was unconstitutional, relying not only on the Constitution’s right to life, but also the Civil Code’s legal personhood provision to extend legal personhood to prenatal life. High courts in **Argentina**, **Chile**, **Ecuador**, and **Peru** initially banned emergency contraception in the early 2000s by interpreting their respective constitutions’ rights to life to extend to embryos. The courts largely (and incorrectly) reasoned that, because the medication interfered with a fertilized egg’s implantation in the uterus, it violated an embryo’s right to life. All four

countries have since reversed course, whether by executive, legislative, or judicial action.

In the **United States**, similarly, various state courts have weighed in on the degree to which prenatal life is afforded legal rights and protections, particularly in the wake of *Roe’s* overturning. In 2024, the **Alabama** Supreme Court held in *LePage v. Center for Reproductive Medicine* that embryos created through IVF should be considered children for purposes of the state’s Wrongful Death of a Minor statute.⁵⁸

The Alabama Supreme Court reasoned that “unborn children” created through IVF qualify as “extrauterine children” under the statute, dismissing concerns that this approach is inconsistent with the definition of “person” in other state laws and citing the state constitution’s commitment to protecting prenatal life as a policy matter.⁵⁹

However, even before *Dobbs v. Jackson Women’s Health Organization*, courts in various U.S. states have granted prenatal life various legal rights or protections through case law. In **Alabama**, **Oklahoma**, and **South Carolina**, high courts have misinterpreted criminal child abuse provisions to apply to prenatal life, paving the way for prosecuting pregnant or postpartum people for substance use during pregnancy.⁶⁰ In **Florida**, a district court recognized a child’s cause of action against their mother for alleged prenatal negligence in a case where the pregnant person was injured in a car crash and gave birth the following day.⁶¹

m The reform also altered various provisions contained in the Civil and Criminal Codes, which had the effect of eliminating criminal penalties for abortion and bodily harm caused to fetuses and various rights fetuses had been entitled to previously (e.g., property).

c. Global Trends Related to Prenatal Personhood in the Context of Abortion Care

The prenatal personhood movement is global, actively pushing for the establishment or expansion of legal rights for prenatal life in countries around the world. More significantly, this movement has relied on legal pathways that are strikingly similar across geographic borders – whether an amendment to the constitution, a legislative reform process, or through judicial decisions. Despite these consistent efforts, they are largely unsuccessful. Decision-makers around the world have overwhelmingly rejected the idea that embryos and fetuses have fundamental rights.

Attempts to amend a country's constitution to include rights for prenatal life have largely failed. In 2015, for example, **Zambian** lawmakers proposed a new Bill of Rights for the country's constitution and sought to include a clause stating that “the right to life begins at conception.”⁶² The referendum ultimately failed to pass.⁶³ In 2023, similarly, voters in **Chile** rejected a draft of a new constitution that would have referred to prenatal life as “quien” (who), rather than “que” (that or which).⁶⁴ In 2025 and 2026, prenatal personhood constitutional amendments have been introduced in at least **four U.S. states** – **Missouri, Montana, Nebraska, and Tennessee**.⁶⁵ Montana's bill failed to pass, and efforts in Missouri, Nebraska, and Tennessee remain pending as of June 2026.ⁿ

Efforts to advance prenatal personhood through legislative reform have been similarly unsuccessful. In 2024, legislators in **Brazil** voted against a bill that would have treated abortions provided after 22 weeks of pregnancy as homicides, even in cases of rape, based on the notion that a fetus is a person under criminal law.⁶⁶ A bill introduced in **Ecuador's** legislature in 2021, “Harmonization of the Protection of the Right to Life from Conception with the Decriminalization of Abortion in Cases of Rape,” has also failed to advance.⁶⁷ Had it passed, this bill would have formally integrated the right to life from conception as part of the country's regulation of abortion care in cases of rape.^o In the 2024 legislative session alone, lawmakers in **16 U.S. states** introduced over 40 bills with prenatal personhood language – spanning child support, tax credits, wrongful death, fetal homicide, and public benefits – the vast majority of which failed to pass.⁶⁸

Finally, high courts have most often rejected the establishment of legal personhood for prenatal life, particularly in cases involving abortion decriminalization. High courts in countries, such as **Colombia** (2022) and

Thailand (2020), have rejected prenatal personhood in cases upholding the constitutionality of broad abortion decriminalization. High courts in **Mexico** (2021), **Nepal** (2007), **South Africa** (1997), and **Slovakia** (2007), among numerous others, have similarly rejected prenatal personhood when considering the permissibility and implementation of laws permitting abortion care through 12 weeks of pregnancy. At least one high court, **Chile** (2017), has rejected prenatal personhood in a decision decriminalizing abortion care under certain circumstances.

In the **United States**, where *Roe v. Wade* had long served as the primary legal basis for rejecting prenatal personhood, both federal and state courts are beginning to weigh in on the legal rights afforded to prenatal life.⁶⁹ In **Kentucky**, for example, the Court of Appeals held that a state statute's definition of “human being” was void for vagueness. The court noted that the varying definitions made it unclear whether the plaintiff and others involved in the IVF process could face prosecution.⁷⁰

The existence– and the exact nature – of references to prenatal life within a constitution, moreover, is not a determinative factor when it comes to the extent a country can or will decriminalize abortion care. While some countries, like **Ireland**, have removed constitutional references to prenatal life as part of abortion decriminalization,⁷¹ others (e.g., Chile and Slovakia) have expanded abortion rights without amending their respective constitutions at all. Countries like Colombia and Mexico have never included explicit references to prenatal life in their respective constitutions.⁷² Instead, their high courts have incrementally changed their interpretation of the nature and scope of the rights and protections afforded to prenatal life over time through abortion jurisprudence, as can be seen in Tables 2 and 3.

ⁿ Because of the confusion in the U.S. in the post-*Dobbs* era, the legal landscape throughout the United States remains in a state of flux.

^o Ecuador's Constitutional Court expanded the scope of its exception to the country's abortion ban in cases of rape in 2021 but left it to the legislature to adopt implementing regulations. The legislature considered various bills seeking to implement the decriminalization of abortion in cases of rape, including this one. This bill, however, also sought to “ratify and specify the international and constitutional state to protect the right to life from conception.”

Table 2: Evolution of the Colombian Constitutional Court’s Treatment of Prenatal Life in Abortion Jurisprudence

	1994	2006	2022
Decision(s)	C-133/94 ⁷³	C-355/06 ⁷⁴	C-055/22 ⁷⁵
Legal Status of Prenatal Life	Constitution protects life from the moment of conception	Distinction between the value of life and a legal right to life “The legal right to life was ruled to be limited to a born human being, while the constitutional value of life can be protected before a fetus has been born.”	Distinction between the value of life and a legal right to life “[T]he value of life does not impose the recognition of prenatal life, as the holder of the rights of persons from conception.”
Legal Status of Abortion	Near total ban	Permitted under three circumstances	Permitted through 24 th week of pregnancy

Table 3: Evolution of the Mexican Supreme Court’s Treatment of Prenatal Life in Abortion Jurisprudence

	2002	2008	2011	2021
Decision(s)	10/2000 ⁷⁶	146/2007 and 147/2007 ⁷⁷	62/2009, 11/2009 ⁷⁸	148/2017, 106/2018, 107/2018 ⁷⁹
Legal Status of Prenatal Life	Federal constitution protects right to life from conception, but that right is not absolute The Constitution “protects human life and likewise protects the product of conception insofar as it is a manifestation of human life, regardless of its stage of biological development.”	Federal constitution’s protection of prenatal life is dependent on prenatal life’s stage of development “Mexico is not required to protect life from the moment of conception, or from any specific point,” so “the protection of life [...] may begin at a different moment if so determined by the domestic legislature.”	State right to life from conception is constitutional “[F]or legal purposes, a fertilized egg, zygote, embryo, or fetus cannot be considered equal or equivalent to an individual understood as a normative subject.”	State right to life from conception is unconstitutional “The right to life is intentionally associated with the born person and not with the product of human conception.”
Legal Status of Abortion	Permitted under three circumstances (Mexico City)	Permitted through 12 th week of pregnancy (Mexico City)	Permitted under four circumstances (San Luis Potosí)	Permitted through 12 th week of pregnancy (nationwide) ^p

^p The Mexican Supreme Court’s decision only decriminalized abortion early in pregnancy in one state, namely Coahuila. However, it declared the criminalization of abortion in early pregnancy to be unconstitutional, paving the way for remaining states to align their laws with federal precedent. “Early in pregnancy” has been understood to be around 12 weeks of pregnancy – both by the Supreme Court and the state legislatures.

Ultimately, constitutional protections for prenatal life do not mandate a particular approach to regulating abortion care.⁸⁰ As Table 4 demonstrates, among the approximately 19 countries whose constitutions afford explicit rights or protections to prenatal life, there is substantial diversity in abortion law – ranging from near-total bans to decriminalization through 12 weeks of pregnancy. This diversity underscores the central role that courts play in interpreting the scope and nature of constitutional protection afforded to prenatal life: not as absolute rights that foreclose access to abortion care, but as interests to be weighed against the competing rights of pregnant people. In other words, constitutional protection for prenatal life can be compatible with a wide spectrum of abortion regulations – and has never been interpreted to require the level of criminalization that prenatal personhood advocates allege.

Table 4: Abortion Laws in Countries with Explicit Constitutional Rights or Protections for Prenatal Life

Total Ban	Narrow Exception(s)	Broad Exception(s)	Gestational Limit
Dominican Republic El Salvador Honduras Jamaica Madagascar Philippines	Chile Ecuador Guatemala Kenya Paraguay Peru Uganda Zimbabwe	Zambia	Czech Republic Equatorial Guinea Hungary Slovakia
Total: 6 countries	Total: 8 countries	Total: 1 country	Total: 4 countries

4. International Human Rights Law's Treatment of Prenatal Life

International human rights treaties protect the right to life, but do not define when life begins.⁸¹ Authoritative sources for interpretation “clarify that these protections do not apply before birth and recognize that to protect an absolute right to life before birth could contradict human rights protections for women.”⁸² Both the history of negotiations for these treaties and their interpretation by oversight bodies indicate that right-to-life provisions do not establish a prenatal right to life.

a. Universal Human Rights System

The International Covenant on Civil and Political Rights (ICCPR) establishes the right to life in its Article 6(1): “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁸³ The history of ICCPR negotiations indicates that its drafters specifically rejected a proposal to amend this article to provide that “the right to life is inherent in the human person from the moment of conception, this right shall be protected by law.”⁸⁴

The Convention on the Rights of the Child (CRC) also protects the right to life of children in Article 6(1), and its Preamble states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”⁸⁵ However, CRC drafters who called for a reference to safeguards before birth clarified that “the purpose of the amendment was not to preclude the possibility of abortion.”⁸⁶ The CRC negotiations also explicitly noted that this language is not intended to prejudice the Convention’s definition of “child” in Article 1, which is “every human being below the age of 18 years.”⁸⁷

Other human rights treaties do not contain right-to-life provisions but still define or otherwise indicate who is considered a rights-holder. Article 1 of the Universal Declaration of Human Rights (UDHR) states that “[a]ll human beings are born free and equal in dignity and rights.”⁸⁸ The history of UDHR negotiations indicates that the drafters intentionally used the word “born” to exclude a prenatal application of the rights included in the Declaration.⁸⁹

Some anti-abortion advocates also point to the ICCPR and CRC’s non-discrimination provisions to defend a prenatal

right to life – namely the obligation to respect, protect, and fulfill the rights enshrined within those treaties without discrimination on various grounds, including “birth.”⁹⁰ Article 26 of the ICCPR states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and requires States Parties to “prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] birth or other status.”⁹¹ Article 2(1) of the CRC requires States Parties to “respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s [...] birth or other status.”⁹² The Society for the Protection of Unborn Children, for example, has argued that this language bars discrimination based on gestational age and that “it would be fundamentally inconsistent for this provision to grant dramatically different protections” before the actual birth of the child.⁹³

While treaty monitoring bodies have yet to directly address these arguments, “birth” in such non-discrimination provisions is generally understood to refer to the circumstances of birth, not to function as a mechanism for extending human rights to prenatal life.

Moreover, treaty monitoring bodies have consistently called for the decriminalization of abortion care⁹⁴ and have documented the human rights violations that result from State Parties’ unwillingness to decriminalize or ensure

access to abortion care under various circumstances.⁹⁵ In addition, where treaty monitoring bodies have directly addressed the rights or interests of prenatal life in their case law⁹⁶, they have clearly pushed back on legal personhood for prenatal life in cases involving abortion restrictions.

In *Mellet v. Ireland* and *Whelan v. Ireland*, the Human Rights Committee (HRC)⁹⁷ decided the cases of two pregnant women who, after being diagnosed with fatal fetal anomalies, were told by doctors they would need to travel to another country to terminate their pregnancies due to Ireland's near-total prohibition of abortion care. Both women ultimately traveled to England to receive abortion care and later brought their cases before the HRC as individual complaints under the ICCPR's Optional Protocol.

In both cases, the HRC concluded that "the balance that the State party has chosen to strike between protection of the fetus and the rights of the woman in the present case cannot be justified."⁹⁷

Moreover, in *Whelan*, the HRC stated that "it cannot accept as a justification or extenuating circumstances the State party's explanations concerning the balance between moral and political considerations that underlies the legal framework existing in Ireland."⁹⁸ In both cases, the HRC ordered Ireland to make full reparation to the women for the harms that they suffered, including through adequate compensation and psychological treatment, and to amend its abortion law.⁹⁹ Ireland ultimately reformed its abortion law to permit the procedure through the first trimester in 2018 – roughly one year after the HRC decided *Whelan*.

However, in *Mellet*, the HRC acknowledged that it did not reach a conclusion "regarding the application of the Covenant to prenatal rights" in the abstract¹⁰⁰, leaving the door open to a different outcome in cases involving other factual scenarios. Importantly, both cases involved non-viable fetuses where "the 'unborn' had no prospect of life."¹⁰¹

b. European Human Rights System

In 1980, the European Commission of Human Rights (Commission) first addressed whether the right to life contained in the European Convention on Human Rights (Convention) extends to prenatal life in *Paton v. United Kingdom*, a case involving the plaintiff's request for an injunction to prevent his wife from having an abortion. The Commission held that interpreting the right to life as granting an absolute right to life of the fetus "would be contrary to the object and purpose of the Convention."¹⁰² According to the Commission:

"The 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman. The 'right to life' of a person already born would thus be considered as subject not only to the express limitations mentioned in paragraph 8 above but also to a further, implied limitation."¹⁰³

—ECHR, Paton v. United Kingdom

In *Vo v. France*, the European Court of Human Rights (Court)^r considered whether France's failure to find a physician liable for negligent care that resulted in the death of a fetus violated the Convention's right to life.¹⁰⁴ The Court determined that the extent to which the right to life extends to prenatal life remained a matter of debate, both generally and within France, at the time. It concluded that there was "no European consensus on the scientific and legal definition of the beginning of life," explaining that, at best, there is common ground among countries in the region "that the embryo/foetus belongs to the human race."¹⁰⁵ Other European conventions, for example, avoid defining terms like "human being." According to the Court:

"The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts [...] – require protection in the name of human

^q The HRC oversees State Parties' compliance with the ICCPR.

^r European Commission of Human Rights decisions are not legally binding on the European Court of Human Rights.

dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2.”¹⁰⁶

In 2007, the Court affirmed its approach to the legal status of prenatal life in *Evans v. United Kingdom*, a case involving a dispute over a former couple’s frozen embryos.¹⁰⁷ It held that, under English law, “an embryo does not have independent rights or interests and cannot claim – or have claimed on its behalf – a right to life under Article 2.”¹⁰⁸

Since then, the Court has heard cases on the regulation of assisted reproductive technologies in Austria and Italy and on restrictive abortion laws in Ireland and Poland. However, it has declined to comment further on the issue of prenatal personhood under the Convention.¹⁰⁹ In *Costa and Pavan v. Italy*, which involved a challenge to Italy’s ban on preimplantation genetic diagnosis in in vitro fertilization, the Court merely stressed that “the concept of ‘child’ cannot be put in the same category as that of ‘embryo.’”¹¹⁰

In cases involving restrictive abortion laws, the Court has continued to cite its previous case law to reiterate the lack of European consensus on the scientific and legal definition of the beginning of life, holding it “impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2.”¹¹¹ As a result, the Court continues to afford European countries significant discretion to determine how a “woman’s right to respect for her private life should be weighed against other competing rights and freedoms invoked, including those of the unborn child.”¹¹²

Notably, in *A, B and C. v. Ireland*, the Court upheld Ireland’s “broad margin of appreciation”¹¹³ to ban abortion care under almost all circumstances, even after acknowledging the “consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion care on broader grounds than accorded under Irish law.”¹¹⁴ Nonetheless, the Court stressed in that same decision that a “prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother’s right to respect for her private life is of a lesser stature.”¹¹⁵

c. Inter-American Human Rights System

In 1981, the Inter-American human rights system considered *Baby Boy v. United States*, a case involving the acquittal on appeal of a Massachusetts doctor who provided an abortion in the months following *Roe v. Wade*.¹¹⁶ Anti-abortion activists presented a petition before the Inter-American Commission on Human Rights (IACHR) against the United States, alleging that refusing to convict the doctor for manslaughter constituted a violation of Baby Boy’s right to life under Article 1 of the American Declaration on the Rights and Duties of Man (Declaration).^{s 117}

Ultimately, the Commission disagreed, holding that the right to life does not begin at the moment of conception under the Declaration.^t To reach this conclusion, the IACHR carried out a comprehensive analysis of the Declaration’s legislative history (i.e., travaux préparatoires), which indicated that its drafters explicitly rejected language that would have extended the right to life to the unborn.¹¹⁸ At the time of adoption (1948), 13 states and territories in the region had abortion laws that would have been in violation of such an interpretation.¹¹⁹ The IACHR’s decision in *Baby Boy* sets an important precedent: rejecting prenatal personhood under the only international human rights treaty that explicitly refers to prenatal life and laying the groundwork for future jurisprudence on the scope of the right to life and the legality of reproductive health services.

As discussed in section 3b, the Constitutional Chamber of Costa Rica’s Supreme Court banned IVF in 1995 in response to a complaint brought by prenatal personhood advocates.¹²⁰ As part of its reasoning, it cited the American Convention on Human Rights’ (Convention) article 4.1, which states that the right to life “shall be protected by law and, in general, from conception.”¹²¹ Subsequently, couples experiencing infertility challenged Costa Rica’s IVF ban before the Inter-American human rights system. In 2012, the Inter-American Court of Human Rights (Court) ruled in favor of the couples, holding that Costa Rica’s absolute ban on IVF resulted in an impermissible violation of their rights under the Convention.

To reach this conclusion, the Court first determined that “it is not applicable to grant the status of person to the embryo”¹²² under Article 4.1 of the Convention, based on its analyses of the Inter-American system’s previous treatment of the right to life, the definition of “conception,” and the meaning of “in general.” It stressed that such an interpretation aligns with both the universal and European human rights systems’ approaches to the scope of their respective rights

^s The U.S. is not a party to the American Convention on Human Rights, but the petitioners claimed that it should be used to clarify the content of the right to life contained in the American Declaration.

^t As a member of the Organization of American States, the United States falls under the Commission’s jurisdiction. However, because the U.S. has not ratified the American Convention on Human Rights, it does not fall under the Court’s jurisdiction. As a result, the U.S. government treats Commission decisions on U.S. matters as mere recommendations. Only the Commission and States can submit cases to the Court, so it is likely that *Baby Boy* did not reach the Court, both due to jurisdictional limitations and because the Commission found for the United States.

to life, as well as regulatory trends in international law and jurisprudence from various countries. In particular, the Court cited the decisions of high courts in **Argentina, Colombia, Germany, Mexico, Spain, and the United States** to support the proposition that “a legitimate interest in protecting prenatal life is recognized, but this interest is distinguished from the right to life” because “any attempt to protect the former interest must be harmonized with the fundamental rights of other individuals.”¹²³

Importantly, the Inter-American Court of Human Rights went beyond ruling on the legal status of an unimplanted embryo under 4.1 of the Convention; it also addressed the limitations that can be placed on protections afforded to prenatal life more generally. While prenatal life is a value protected by the Convention, the Court held that its protection is not absolute. The absolute protection of a prenatal right to life “denies the existence of rights that may be subject to disproportionate restrictions under the guise of absolute protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty.”¹²⁴ The purpose of the phrase “in general” in Article 4.1, as a result, is to ensure that the right to life is not understood as an absolute right, in a way that could justify denying other rights altogether.

The Court then relied on a proportionality test^u to analyze the conflict of rights in the case before it, citing prior case law that established that a right may be restricted so long as the interference is not abusive or arbitrary.¹²⁵ When applied to Costa Rica’s IVF ban, the Court found that the law directly interfered with infertile couples’ ability to enjoy their right to private and family life, indirectly affected their enjoyment of the right to non-discrimination, and did little to protect the interests of prenatal life. As a result, it concluded that the ban constituted an excessive and arbitrary interference with the rights of both individuals and couples to personal integrity, personal freedom, and private and family life.¹²⁶

Finally, the Court stressed that protections of prenatal life should be carried out through the pregnant person, not at her expense:

“[T]he direct object of protection is fundamentally the pregnant woman since the defense of the unborn is essentially carried out through the protection of the woman, as derived from Article 15.3.a) of the Protocol of San Salvador, which obliges States Parties to ‘grant special attention and assistance to the mother before and during a reasonable period after childbirth,’ and Article VII of the American Declaration, which enshrines the right of a pregnant woman to special protection, care, and aid.”¹²⁷

^u The Court’s proportionality test analyzes: “(i) the level of harm to one of the rights at stake, determining whether the level of this harm was serious, intermediate or moderate; (ii) the importance of ensuring the contrary right; and (iii) whether ensuring the latter justifies restricting the former.”

5. Legal and Policy Arguments Against Prenatal Personhood

Most high courts that have weighed in on the scope of rights and protections afforded to prenatal life have done so in the context of cases involving the decriminalization of abortion care. While high courts in the United States and Western Europe handed down numerous landmark abortion cases during the late twentieth century, countries from other parts of Europe and the Global South “are proving to be laboratories of thought and innovation in the twenty-first century.”¹²⁸ High courts have not only cited but, in some cases, built upon the arguments advanced by international human rights bodies regarding the law’s treatment of prenatal life.

In these landmark cases, judges have grappled with similar underlying questions related to the law’s treatment of prenatal life: what types of legal protections should prenatal life be afforded, and what happens when these legal protections conflict with born people’s rights? The overwhelming majority of high courts have rejected the concept of legal personhood for prenatal life and, in doing so, have relied upon strikingly similar legal and policy arguments. This section examines the most common legal and policy arguments relied on by high courts, as well as international human rights bodies, to justify their rejection of broad legal rights for prenatal life.

a. Prenatal Life Can Have Value Without Being Afforded Legal Rights or Full Legal Personhood

Various U.S. scholars have long stressed that it is possible to recognize the value of prenatal life without granting it legal personhood.¹²⁹ A gradualist view, for example, recognizes that human life is morally significant, even at the earliest stages, and that the state’s regulation of prenatal life varies depending on its developmental stage.¹³⁰ Another approach proposes a subjective and relational understanding of fetal value, which recognizes the variation in how pregnant people conceptualize pregnancy and argues that fetal value is, therefore, created by and dependent on the views and attachment of the pregnant person.¹³¹ These alternative framings align with how some anthropologists have observed and characterized the lived experiences of people assigning value to their pregnancies.¹³² Both also respond to concerns that reproductive rights advocates have historically approached abortion law and policy in a way that “largely excludes the fetus from view” and “may ultimately prove vulnerable because its legal conceptualization strays too far from everyday experience and majoritarian moral intuition.”¹³³

High courts have used different terminology to refer to prenatal life (e.g., legal “good,” “asset”, or interest), generally recognizing its significant inherent value due to its potential to become a human being.¹³⁴ However, high courts in every region have stressed that assigning value to a pregnancy does not require extending legal rights or personhood to prenatal life.

In a 2007 case involving the constitutionality of decriminalization of abortion care through the 12th week of pregnancy, **Slovakia’s** Constitutional Court stressed the clear distinction between the protection granted to prenatal life and the right afforded human beings. The constitution’s right to life “clearly distinguishes between the legal status of nasciturus and legal status of born person,” characterizing the former as “worthy of protection” and the latter as having “the right to life.”¹³⁵ This distinction “suggests a difference between the right to life as a personal, subjective entitlement and the protection of unborn human life as an objective value”¹³⁶ and led to a recognition by the Court that the state’s obligation to protect a fundamental right and objective value are “naturally not identical.”¹³⁷

Colombia’s Constitutional Court reached a similar conclusion, holding “the value of life does not impose the recognition of prenatal life, as the holder of the rights of

persons from conception.”¹³⁸ The Court emphasized that “[h]uman life passes through different stages and manifests itself in different ways, which in turn have different legal protections.”¹³⁹

Accordingly, Colombia’s Constitutional Court recognized the constitutional value of life, including prenatal life, while drawing a clear distinction between that value and a legal right to life.¹⁴⁰ “The legal right to life was ruled to be limited to a born human being, while the constitutional value of life can be protected before a fetus has been born.¹⁴¹

b. The Law Does Not Determine When Life Begins

Legal scholars and experts have argued that prenatal personhood improperly imposes one religious or moral view of when life begins on an entire society and, as a result, runs counter to the separation of church and state (also known as “the principle of the secular state” or secularism).¹⁴² In the wake of *Dobbs*, various U.S. legal scholars have determined that abortion bans and restrictions violate the Establishment Clause of the federal constitution for the following reason:¹⁴³ “Early abortion bans not only favor one religious belief on the contested question of when life begins, but codify that belief into law. Imposing onto all Americans the religious perspective that life begins at conception should violate the Establishment Clause.”¹⁴⁴

Human rights experts have also noted that “the scientific or medical impossibility of stating when conception occurs or human life begins, and the philosophical and religious diversity of opinion worldwide as well as within countries” has served as a powerful basis for rejecting prenatal personhood historically.¹⁴⁵

While these arguments have been most fully developed in judicial decisions, the underlying principle – that no branch of government should purport to resolve what science, philosophy, and religion cannot – applies with equal force to legislative and executive action. Numerous high courts have stressed that constitutions can establish, and judges can interpret the scope of protections for prenatal life without addressing the question of when life begins. Echoing the

U.S. Supreme Court in *Roe v. Wade*, **Nepal’s** Supreme Court found it infeasible for the judiciary to weigh in on “such a complex, scientific, philosophical and policy related issue i.e. when does life begin?”¹⁴⁶ Similarly, **Mexico’s** Supreme Court emphasized “the impossibility of the courts and legislatures to determine normatively and legally the beginning of human life dilemma regarding which there is no scientific, moral, or religious consensus.”¹⁴⁷ In addition, **South Africa’s** high court clarified that “it is not the function of this court to decide” when life begins “on religious or philosophical grounds.”¹⁴⁸ Instead, according to **Canada’s** Supreme Court, “[a]scribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties...In short, this court’s task is a legal one.”¹⁴⁹

The IACHR arguably built upon this line of argumentation in its decision in *Artavia Murillo (In Vitro Fertilization) v. Costa Rica*. After acknowledging the range of biological, medical, ethical, moral, philosophical, and religious perspectives on when life begins, the Court determined that giving precedence to any of these views is impermissible because it “would imply imposing specific types of beliefs on others who do not share them.”¹⁵⁰

In fact, some decision-makers and advocates have gone further, arguing that laws establishing when life begins constitute a violation of the separation of church and state. In **Canada’s** landmark abortion case, *R. v. Morgentaler*, one justice stressed that Canada’s abortion ban constituted the state’s endorsement and enforcement of “one conscientiously-held view at the expense of another.”¹⁵¹ Similarly, in a concurring opinion in *Thornburgh v. Am. Coll. of Obstetricians*, one **U.S.** Supreme Court justice characterized “suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth” as wrong.¹⁵² According to Justice Stevens, “I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests.”¹⁵³

More recently, advocates in **Colombia** and the **United States** have similarly argued abortion bans violate the separation of church and state. In Colombia, advocates alleged that the country’s abortion ban violated Article 19 of the constitution, which states that “[a]ll religious faiths and churches are equally free before the law.”¹⁵⁴ In their complaint, the advocates explained that abortion regulations in Colombia and other parts of the world are grounded in a moral position, namely the interest in protecting prenatal life. Secularism, however, prohibits the government from imposing or defending norms, values, or moral principles linked to a particular religion¹⁵⁵ and thereby establishing them “as general truths for all.” In the United States, religious leaders cited explicit legislative language finding that life begins at conception as evidence that Missouri’s abortion restrictions imposed a specific, sectarian set of

religious beliefs on all Missourians.¹⁵⁶ While the Colombian Constitutional Court and the trial court in Missouri ultimately dismissed this line of argument, it could benefit from further development and testing before other courts.

c. Prenatal Personhood Undermines the Rights of Women and People Who Can Become Pregnant

Legal scholars from various countries have pointed to the dangerous implications of prenatal personhood for pregnant people. An Irish legal scholar reflected that, under the country's previous prenatal personhood framework, courts frequently "reduced a woman from being a rights-bearing individual to a fetus-bearing mother."¹⁵⁷ At the same time, prenatal personhood curtailed women's rights to information, association, and travel related to abortion care because they were viewed as contrary to prenatal protection.¹⁵⁸ According to an Argentine legal scholar, when prenatal life is legally framed as a person, "the fetus, embryo, or fertilized egg becomes the protagonist of the narratives," while "women are pushed to the background, stereotyped, and reduced to 'mothers.'"¹⁵⁹ Accordingly, as noted by U.S. legal scholars, prenatal personhood results in threats to pregnant people's health and medical decision-making, limitations on opportunities for growing a family, and the further dehumanization of pregnant people through surveillance and control.¹⁶⁰ When taken to its extreme, prenatal personhood results in the criminalization and punishment of pregnant people themselves.¹⁶¹

Nearly every high court that has ruled on the constitutionality of an abortion law has concluded that granting full legal personhood to prenatal life results in violations of pregnant people's rights – whether those afforded by national constitutions or international human rights treaties or both.

High courts that have relied on this line of argument typically begin by establishing that constitutional and human rights are not absolute. **Ecuador's** Constitutional Court, for example, stated in 2021 that "the constitutional framers did not foresee any ex ante primacy of one right over another nor established that any right is absolute."¹⁶² As a result, "even though protection of life from conception is a primary value

within the Constitution, it cannot be interpreted in isolation or absolutely, but must be understood systematically with other constitutional rights and principles."¹⁶³

High courts have noted a range of rights threatened by prenatal personhood, including the rights to life, health, dignity, autonomy, equality and nondiscrimination, freedom of conscience, and freedom from cruel, inhuman, and degrading treatment. The high courts in **Slovakia** and **South Africa** have warned that a prenatal right to life triggers broad abortion bans. In addition, according to South Africa's high court, "the termination of a woman's pregnancy would no longer constitute the crime of abortion, but that of murder."¹⁶⁴

High courts have, nonetheless, taken different approaches to "weighing" a pregnant person's rights against the constitutional protections afforded to prenatal life. Some have stressed that a pregnant person's rights carry greater weight than the interests of prenatal life. **Italy's** Constitutional Court established that "there is no equivalence between the right not only to the life but also to the health of a person who already exists, like the mother, and the protection of an embryo that has not yet become a person."¹⁶⁵ A justice on **Mexico's** Supreme Court reached a similar conclusion in response to allegations that the state of San Luis Potosí's protection of the right to life from conception treated "unborn" and born persons equally, when they are "factually unequal."¹⁶⁶ In a separate opinion,^v Justice José Fernando Franco González characterized the establishment of a prenatal right to life as a violation of the right to equality and nondiscrimination, referencing the Court's jurisprudence requiring that equals be treated equally and that unequals be treated unequally.¹⁶⁷

Even where high courts have characterized the rights and interests of the pregnant person and those of prenatal life to be "of equal hierarchy" in theory, they have recognized the need to balance these rights and interests when considering the constitutionality of specific laws, including abortion bans. The Inter-American human rights system and most high courts have applied balancing or proportionality analyses to find "an appropriate equilibrium that allows the coexistence" of the pregnant person's rights and the state's obligation to protect prenatal life. Human rights bodies and high courts have carried out the balancing analyses to justify the decriminalization of abortion care to varying degrees, from narrow exceptions to broad health and socioeconomic exceptions to a range of gestational limits.

^v In Mexico, a separate opinion can serve as a concurring or dissenting opinion. In this case, the opinion agrees with the majority opinion's holding but relies on somewhat different reasoning.

In general, these decision-making bodies have characterized the value of, and the protections afforded to, prenatal life as increasing over the course of pregnancy, alongside the development of traits associated with being human and the possibility of independent survival.

Finally, several high courts have explicitly rejected the notion that protecting prenatal life inherently conflicts with the rights of pregnant people.¹⁶⁸ **Nepal's** Supreme Court, for instance, has stressed that the fetus's existence is completely dependent on the pregnant person. "It is well understood that a fetus does not have an independent existence and its existence is confined only inside the mother's womb. Therefore, even if a fetus is deemed to have any interest, it cannot exist against the interest of the mother. Protection of the fetus has its own importance; a fetus has significance for a pregnant mother too; however, the interests of the mother and that of the fetus are not separate. Instead, it is appropriate to view it in an integrated manner that the interest of the fetus is the part of mother's interest."¹⁶⁹

Colombia's and **Mexico's** high courts, alternatively, have stressed the need to protect prenatal life through the protection of pregnant people.¹⁷⁰ In fact, Colombia's Constitutional Court has provided concrete examples of measures that protect both prenatal interests and pregnant people's rights – including those that prevent recurrent miscarriage of wanted pregnancies, improve prenatal and emergency obstetric care, and prevent child marriage so that women are sufficiently mature to safely bear children.¹⁷¹

d. Prenatal Personhood Undermines the Rule of Law

Legal scholars and experts have repeatedly argued that the drafters of national constitutions and international human rights treaties never intended to extend the right to life – as well as other constitutional and human rights – to prenatal life. In response to the prenatal personhood movement's argument that prenatal life should be included within the definition of "person" under the Equal Protection Clause of the federal Constitution, some U.S. legal scholars have stressed that, at the time of the 14th Amendment's ratification in 1868, neither the public understanding nor the legal meaning of "person" included fetuses or other prenatal life.¹⁷²

Human rights experts who have analyzed the drafting histories of various international human rights treaties reached a similar conclusion: "from their inception and as a matter of international law, human rights begin at birth."¹⁷³

Various high courts have invoked the intent of the drafters of constitutions and human rights treaties to bolster this line of argument. **Nepal's** Supreme Court, for example, pointed to the fact that the constitution "has not dealt with any right of an unborn child including his/her constitutional, religious, property or other rights."¹⁷⁴ High courts in both **Chile** and **South Africa** have examined how their constitutions treat children's rights, concluding that the drafters never intended to include prenatal life in their respective definitions of rights-holders. They both pointed to certain rights afforded to children in the constitution that could not have been intended to include prenatal life, such as the rights to privacy, travel, or choice of health system (**Chile**) and those related to work, detention, and armed conflict (**South Africa**).¹⁷⁵ Ultimately, according to Chile's Constitutional Court, "[t]he unborn does not have the enabling conditions to be recognized as a person and a right holder."¹⁷⁶

Other high courts have stressed the sweeping and impractical consequences of taking prenatal personhood to its logical conclusion. **Slovakia's** Constitutional Court, for instance, warned that creating various categories of the right to life with different levels of significance could potentially have a destructive impact on a country's rule of law.¹⁷⁷ **Chile's** Constitutional Court, similarly, cautioned that granting prenatal life legal personhood would "distort the rest of the constitutional and legal system."¹⁷⁸

As discussed in section 4c, human rights bodies have reached similar conclusions through analyzing the drafting histories of various treaties. In *Baby Boy*, for example, the IACHR found that when approving the American Declaration on the Rights and Duties of Man, the drafters "faced this question but chose not to adopt language which would clearly have stated that principle."¹⁷⁹

In addition, in *Artavia*, the Court determined that the phrase "every person" appears in various articles of both the Convention and the Declaration, and "it is not feasible to argue that an embryo holds and exercises the rights enshrined in each of these articles."¹⁸⁰

6. Toolkit for Countering Legal Personhood for Prenatal Life in the United States

Since the *Dobbs* decision, efforts to entrench prenatal personhood in U.S. law and policy have gained momentum. The prenatal personhood movement is global in nature, and decision-makers in countries around the world have encountered and successfully pushed back against similar attempts to establish or broaden the scope of legal rights afforded to prenatal life. As state lawmakers in the United States explore ways to counter efforts to advance prenatal personhood, they should look to the arguments that decision-makers in these countries, as well as various international human rights bodies, have relied on.

a. Policy Messages

- i. Prenatal personhood poses a direct threat to the **rights of women and people who can become pregnant**, as well as their families and communities.
- ii. Prenatal personhood imposes **one religious or moral view** of when life begins on an entire society – a determination that is widely recognized to exceed the authority of decision-makers.
- iii. Prenatal personhood undermines the **rule of law**, leading to absurd and unintended applications of the law.
- iv. The normalization of prenatal personhood rhetoric in the United States runs **counter to global trends**, with international human rights law and the overwhelming majority of countries consistently and resoundingly rejecting broad legal rights for prenatal life.

b. Additional Resources

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