

## THE PERSONHOOD STRATEGY: A STATE'S PEROGATIVE TO TAKE BACK ABORTION LAW

RITA M. DUNAWAY\*

### I. INTRODUCTION

In *Roe v. Wade*, the Supreme Court found insufficient legal evidence to support a judicial conclusion that unborn children were “persons” entitled to the protection of the Fourteenth Amendment of the United States Constitution. However, the Court explicitly stated that the case for abortion would “collapse” if the personhood of unborn children were ever conclusively established.<sup>1</sup>

While the Supreme Court’s limitation of the universe of Constitutional persons forecloses the opportunity for unborn children to benefit from the fundamental rights enshrined in the United States Constitution, it remains within the province of state power to afford fundamental rights under state law to all human beings, born and unborn. Because science demonstrates that every human life begins at the time of conception, and because the law increasingly recognizes the humanity of unborn children, state legislatures have ample factual support for definitively extending legal personhood to the unborn.

A State’s conferral of legal personhood upon unborn human beings would not, on its own, affect a woman’s existing abortion rights.<sup>2</sup> However, a personhood bill such as the model proposed

---

\* J.D. Washington and Lee University School of Law, 2001; B.A. West Virginia University, 1998; B.S. West Virginia University, 1998. Thanks to John W. Whitehead, President of The Rutherford Institute, for his courage in taking public stands on unpopular issues; Steven H. Aden, Senior Counsel at Alliance Defense Fund, for his consistent encouragement and practical advice; and Clarke Forsythe, Senior Counsel at Americans United for Life, for his thoughtful comments and suggestions. Most of all, thanks to my family for their encouragement and inspiration.

1. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

2. *See, e.g.*, *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 505 (1989) (preamble of state abortion statute stating unborn children have protectable interests in life beginning at conception constitutes a value judgment of favoring childbirth and does not impose substantive restrictions on abortion)

herein would lay a foundation of rights for unborn human beings that would act as a counterweight to the rights of other persons, including the mother, as courts apply the Supreme Court's balancing tests in future cases.

A unique aspect of the personhood strategy discussed herein is its potential to afford the federal judiciary an opportunity to return the abortion issue to the states *without* reversing *Roe v. Wade*. By conferring legal personhood upon the unborn, states may ultimately change the factual-legal context in which *Roe v. Wade* was decided, thereby producing a different result when a future abortion restriction is challenged. The Supreme Court could hold that in states where the unborn are afforded all the civil rights of persons, the woman's privacy rights are outweighed by the unborn child's fundamental right to life under the state's constitution.

Momentum is growing in the United States to ensure that every member of the human family is afforded the inalienable rights to which he is entitled "by virtue of his humanity."<sup>3</sup> In Colorado, Montana, Georgia, South Carolina, South Dakota, Louisiana, Illinois and Missouri, lawmakers and citizens have already taken steps toward recognizing personhood for every human being from conception. It is therefore important to examine, in detail, the legal grounding for and true potential of a prudent "personhood" approach.

## II. FROM ROE TO GONZALES: THE "PERSON"-SHAPED HOLE IN ABORTION JURISPRUDENCE

In *Roe v. Wade*, the Supreme Court held that the Constitutional "right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>4</sup> But this determination alone did not resolve the abortion issue, for the State of Texas argued that the Fourteenth Amendment to the United States Constitution established a "right to life" in the unborn child.<sup>5</sup> The Court stated:

---

3. Brief of Mother Teresa as Amicus Curiae Supporting Petitioner-Appellant, *Loce v. New Jersey*, 510 U.S. 1165 (1994) (urging the Supreme Court to grant certiorari and recognize the unalienable rights of unborn children), available at <http://www.americanprinciplesproject.org/topics/life-issues/58-amicus-curiae-brief-of-mother-teresa.html>.

4. *Roe*, 410 U.S. at 153 (citation omitted).

5. *Id.* at 156.

The appellee and certain amici argue that the fetus is a “person” within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. *If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.*<sup>6</sup>

However, the Court rejected the personhood argument based on the absence of any legislative or judicial evidence to support it.<sup>7</sup>

The Constitution does not define “person” in so many words . . . [b]ut in nearly all these instances [where the word “person” is used in the Constitution], the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word “person,” as used in the Fourteenth Amendment, does not include the unborn.<sup>8</sup>

In response to the State’s argument that unborn children were entitled to Fourteenth Amendment protection, the Court also noted inconsistencies between that position and the State’s treatment of the fetus in other contexts:

When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother’s condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment’s

---

6. *Id.* (emphasis added).

7. *Id.* at 158.

8. *Id.* at 157-58 (citations omitted) (emphasis added).

command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by [Texas law] is significantly less than the maximum penalty for murder prescribed by [Texas law]. If the fetus is a person, may the penalties be different?<sup>9</sup>

Based on the *absence* of any positive constitutional direction as to whether or not the unborn should be considered persons for purposes of assigning and balancing fundamental rights, the inconsistencies in Texas' treatment of the unborn and inferences drawn from the history of nineteenth century abortion laws, the Court concluded that the unborn are not persons for Federal Constitutional purposes. In other words, because the unborn had not been legally recognized as persons "in the whole sense" before, the Court deemed them ineligible for Fourteenth Amendment protection.<sup>10</sup>

It is important to note that the Court did not base its conclusion on scientific or medical data. The Court specifically declined to "resolve the difficult question of when life begins."<sup>11</sup> Instead, it is clear from the Court's opinion that the Court considered the concept of legal personhood to be distinct from the existence of human life. This was not an entirely novel idea, inasmuch as the Court had been extending legal personhood to corporations since at least as far back as 1886.<sup>12</sup> However, it seems counterintuitive for the Court to *withhold* the status of personhood from unborn humans who, in the Court's words, had at least the "potential" for human life.<sup>13</sup> Nonetheless, it was presumably only in this context, where the unborn child could be designated a non-person, that the outcome of the Court's balancing test in *Roe* could

---

9. *Roe*, 410 U.S. at 157 n.54 (internal citations omitted).

10. *Id.* at 162.

11. *Id.* at 159.

12. *See, e.g., Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).

13. While there may be valid practical considerations underlying the Court's expansion of the "personhood" concept beyond natural persons, the extent to which society has passively accepted judicial retraction of the term to exclude natural human beings based on their stage of development is surprising.

favor the mother's privacy rights.

The Court's ultimate holding was that a mother's fundamental privacy rights, previously established in cases such as *Griswold v. Connecticut*, allow her to "terminate" her pregnancy, subject only to the State's interest in "potential life" and maternal health.<sup>14</sup> These interests, both of which the Court considered State interests (having deemed the unborn child a non-person), became "sufficiently compelling" to warrant interference with the mother's privacy only in the third trimester of pregnancy. Again, note that the unborn child, as a non-person, had no rights at all to be balanced on the scales of justice.

Including only the rights and interests of pregnant women and the State in its balancing test, the Court concluded that the weight to be accorded each of them changes throughout the pregnancy. The Court announced that during the first trimester of pregnancy, the State could not interfere with the woman's right to choose an abortion. During the second trimester, the State could regulate abortion in ways that are reasonably related to maternal health. Once the unborn child was "viable," however, the State could go so far as to proscribe abortion, unless abortion was necessary for the preservation of the life or health of the mother.<sup>15</sup>

Many constitutional scholars soon recognized that the holding of *Roe v. Wade* was a jurisprudential nightmare. Justice Scalia, in criticizing the court for refusing to revisit the fundamental question, has lamented that "the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be."<sup>16</sup> Yet, having breathed life into a new Constitution-based right of abortion, the Supreme Court was left to its own devices to expound and interpret the new right in various contexts.

In its next landmark abortion case, *Webster v. Reproductive Health Services*, the Court retreated slightly from its *Roe v. Wade* decision, announcing that the State may protect "potential life" even before the point of viability.<sup>17</sup> In *Webster*, the Court reviewed

---

14. *Roe v. Wade*, 410 U.S. 113, 167 (1973) (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

15. *Roe*, 410 U.S. at 163–64.

16. *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 537 (1989) (Scalia, J., dissenting).

17. *Id.* at 519.

a Missouri statute that forbade public employees to perform abortions not necessary to save the mother's life, prohibited the use of public facilities for said purposes and prohibited the use of public funds to counsel a woman to have an abortion that was not necessary to save her life.<sup>18</sup> The statute further provided that before a doctor could perform an abortion on a woman carrying an unborn child that was twenty or more weeks old, the doctor must perform medical tests to determine whether or not the child was viable.<sup>19</sup>

In upholding the Missouri law, the Court first explained that the government has no obligation to fund or affirmatively facilitate abortion, then went on to reaffirm the State's important interests in protecting maternal health and "the potentiality of human life."<sup>20</sup> In a part of the opinion joined by Justices White and Kennedy, Chief Justice Rehnquist suggested that the State's interest in protecting "potential human life" is present throughout the pregnancy.<sup>21</sup>

The portion of the *Webster* opinion most pertinent to the instant discussion is the Court's consideration of the preamble to the Missouri statute, which set forth findings by the Missouri Legislature that "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health, and well-being."<sup>22</sup> The Preamble then mandated that state laws be interpreted to provide unborn children with "all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," subject to the Constitution and the Supreme Court's precedents.<sup>23</sup>

In defending the Preamble, Missouri argued that the language was merely precatory and imposed no substantive restrictions on abortions.<sup>24</sup> Challengers argued that this Preamble was intended to inform the interpretation of the remainder of the statute.<sup>25</sup>

In holding the Preamble unconstitutional, the Court of Appeals had relied upon Supreme Court dictum in *Akron v. Akron*

---

18. *Webster*, 492 U.S. 490.

19. *Id.* at 513.

20. *See id.* at 509–510, 516–15.

21. *See id.* at 519.

22. *Id.* at 504 (citing Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986)).

23. *Id.* (citing Mo. Rev. Stat. § 1.205.2 (1986)).

24. *Id.* at 505.

25. *Id.*

*Center for Reproductive Health*<sup>26</sup> that “a State may not adopt one theory of when life begins to justify its regulation of abortions.”<sup>27</sup> The Supreme Court held that the Court of Appeals had misconceived the *Akron* dictum, which meant only that a “[s]tate could not justify an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State’s view about when life begins.”<sup>28</sup> The Supreme Court ultimately refused to overturn the preamble, leaving the State of Missouri to interpret the language rather than construing it in absence of any actual applications.<sup>29</sup>

In 1992, the Supreme Court again addressed a State’s attempts to regulate abortion in *Planned Parenthood v. Casey*.<sup>30</sup> In a 5-4 decision, the Court upheld most of the State of Pennsylvania’s challenged abortion regulations, including a 24-hour waiting period, a requirement that the woman receive certain information pertaining to abortion and a spousal notification requirement. The joint opinion held that State regulations of abortion that furthered legitimate State interests and were not designed to strike at the right itself would be upheld unless they imposed an undue burden on a woman’s ability to obtain an abortion.<sup>31</sup>

The Court was conspicuously fragmented, however, on the bigger issues before it, including that of whether or not the *Roe v. Wade* framework should be discarded. Justices O’Connor, Kennedy and Souter expressed their collective belief that while the central holding of *Roe* ought to be retained and reaffirmed, *Roe*’s trimester framework should be abandoned.<sup>32</sup> On the other hand, Chief Justice Rehnquist, along with Justices White, Scalia and Thomas, bluntly stated, “We believe that *Roe* was wrongly decided, and that it can and should be overruled . . . .”<sup>33</sup>

In a separate opinion, Justice Stevens agreed with the plurality that *Roe* should be reaffirmed but went on to reiterate, in his own

---

26. 462 U.S. 416, 444 (1983).

27. *Reprod. Health Services v. Webster*, 851 F.2d 1071, 1075 (8th Cir. 1988) (quoting *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444 (1983), in turn citing *Roe v. Wade*, 410 U.S. 113, 159-62 (1973)).

28. *Webster*, 492 U.S. at 506

29. See *id.*

30.

31. See *id.* at 877.

32. *Id.* at 871, 873.

33. *Id.* at 944 (Rehnquist, C.J., White, J., Scalia, J. & Thomas, J., concurring in part and dissenting in part).

words, the reasoning behind *Roe*'s holding.<sup>34</sup> Justice Stevens reminded the reader that the Court in *Roe* had "carefully considered, and rejected, the State's argument 'that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment.'"<sup>35</sup> He pointed out that there was no dissent from this holding.<sup>36</sup> Then Justice Stevens declared: "Thus, as a matter of federal constitutional law, a developing organism that is not yet a person does not have what is sometimes described as a 'right to life.' This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy."<sup>37</sup> While Justice Stevens' conclusion is certainly an accurate summary of the Court's reasoning in *Roe*, it does not address the potential for states to confer state constitutional rights upon the unborn, thereby creating a counterweight to the mother's federal privacy rights.

Eight years after handing down its decision in *Casey*, the Supreme Court considered the constitutionality of a Nebraska statute that outlawed partial-birth abortions. In *Stenberg v. Carhart*, the Court was again badly fragmented but, in a 5-4 decision, held that the statute was unconstitutional for two reasons.<sup>38</sup> First, using a strict application of *Roe*'s language, the Court held that the law was invalid because it lacked an exception for the preservation of the health of the mother.<sup>39</sup> Second, applying the more general language of *Casey*, the Court found the Nebraska statute unconstitutional because it imposed an undue burden on a woman's right to choose a partial-birth abortion.<sup>40</sup> Thus, in the Court's view, the law unduly burdened the woman's right to choose abortion itself.<sup>41</sup> Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas each wrote a separate dissent in the case, with three of the four describing *Roe v. Wade* as "grievously wrong" and calling for it to be overruled.<sup>42</sup>

The Supreme Court's most recent foray into abortion

---

34. *Id.* at 912 (Stevens, J., concurring in part and dissenting in part).

35. *Id.* at 913 (quoting *Roe v. Wade*, 410 U.S. 113, 159 (1965)).

36. *Id.* (Stevens, J., concurring in part and dissenting in part).

37. *Id.* at 913-14.

38. 530 U.S. 914, 930 (2000).

39. *Id.* at 930-38.

40. *Id.* at 938-46.

41. *Id.*

42. *Id.* at 980 (Thomas, J., dissenting).

jurisprudence yielded some evidence that a majority of the Court may be primed to enter a new era in this realm of civil rights. In *Gonzales v. Carhart*, the Supreme Court upheld a federal ban of partial-birth abortion.<sup>43</sup> Congress passed the Partial-Birth Abortion Ban Act of 2003 (the “Act”) to outlaw the very same type of abortion procedure banned by the Nebraska statute that was overturned in *Stenberg*.

In order to avoid the fate of the State of Nebraska’s partial-birth abortion ban statute, Congress recorded factual findings to document its reasons for passing the Act. One of these findings was that “[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.”<sup>44</sup> Congress further stated: “Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.”<sup>45</sup>

In upholding the federal law, the Supreme Court’s opinion reaffirmed both the wide discretion of the legislative branch to legislate in areas of scientific and medical uncertainty and the importance of the state’s interest in “promoting respect for human life at all stages in the pregnancy.”<sup>46</sup>

Justice Thomas wrote a concurring opinion in the case, which Justice Scalia joined. Thomas stated simply that while the majority opinion represented an accurate application of current abortion jurisprudence, said jurisprudence, including *Roe v. Wade*, had no basis in the Constitution.<sup>47</sup> Justice Ginsburg authored a scathing dissent, joined by Justices Stevens, Souter and Breyer, expressing their objection to any abortion regulation that does not include a health exception. But underlying this specific concern about the lack of a health exception is a more systemic objection to the majority’s opinion in the case.

Justice Ginsburg’s dissatisfaction signals that the significance of *Gonzales v. Carhart* may reach further than the narrow holding

---

43. 550 U.S. 124 (2007).

44. Congressional Findings (1), in notes following 18 U. S. C. § 1531 (2000 ed., Supp. IV), p. 769.

45. *Id.* at 14(N).

46. *Gonzales v. Carhart*, 550 U.S. at 163.

47. *Id.* at 168–69 (Thomas, J., concurring).

that the Partial-Birth Abortion Ban Act is constitutional. This decision indicates a shift in the balance of interests involved in abortion cases. Repeatedly, the majority reiterated the importance of the State's interest in "promoting respect for human life." A reading of the majority opinion conveys, perhaps for the first time in the Supreme Court's abortion jurisprudence, the impression that this interest in the life of the unborn (however nebulously described) is increasingly important relative to a woman's "right" to have an abortion. In Justice Ginsburg's words, the Act "surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices."<sup>48</sup>

Evidence of this ideological shift is found in the wording of the opinion. As Justice Ginsburg pointed out in her dissent:

The Court's hostility to the right Roe and Casey secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby;" second-trimester, previability abortions are referred to as "late-term;" and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. And, most troubling, Casey's principles, confirming the continuing vitality of "the essential holding of Roe," are merely "assumed" for the moment, rather than "retained" or "reaffirmed."<sup>49</sup>

The Court's opinion tacitly recognized that the fetus inside a pregnant woman is a living human being, stating that, "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb."<sup>50</sup> Indeed, that fact was not even contested by the parties.<sup>51</sup>

---

48. *Id.* at 171 (Ginsburg, J., dissenting).

49. *Id.* at 186-87 (Ginsburg, J., dissenting) (internal citations omitted).

50. *Id.* at 147.

51. *Id.*

## III. BRINGING LAW INTO LINE WITH SCIENCE

In 1973, when the United States Supreme Court considered the State of Texas' argument that the fetus was a "person" entitled to protection under the Fourteenth Amendment, the Court resolved the question in the negative by examining historical and contemporary legal treatment of the unborn rather than scientific and medical textbooks.<sup>52</sup> This approach was faulty from the start, because state statutes and common law simply had not kept pace with scientific knowledge regarding human development. Today, however, we are beginning to see a trend toward laws that reflect the scientific and medical consensus as to when human life begins.

A. *Scientific Knowledge and Legal Treatment of the Unborn Prior to Roe v. Wade*

Early state laws generally followed the course of English common law, under which the treatment of abortion typically turned on whether or not "quickening," (the point at which the mother could feel the unborn child moving in the womb) had occurred.<sup>53</sup> Quickening generally occurs between the 16th and 18th week of pregnancy.<sup>54</sup> This developmental landmark was chosen because it was only at the time of quickening that medical science could accurately diagnose pregnancy.<sup>55</sup>

However, as medical knowledge advanced during the middle of the Nineteenth Century and prominent doctors began to recognize that the unborn child was alive prior to the time when its motions could be perceived by the mother, a movement began in the scientific and medical community to limit abortion prior to quickening.<sup>56</sup> For example, in 1857, an American Medical Association (AMA) Committee report attributed the practice of abortion to "wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the fetus is not alive till after the period of quickening."<sup>57</sup> The Committee

---

52. See *Roe v. Wade*, 410 U.S. 113, 157–63 (1973).

53. See *id.* at 134–36.

54. *Id.* at 132 (citing DORLAND'S MEDICAL DICTIONARY 1261 (24th ed. 1965)).

55. See, e.g., Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* 203 (1989).

56. See Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES IN LAW & MED. 119, 181–84 (2007).

57. *Roe*, 410 U.S. at 141 (citing American Medical Association (AMA) Committee on

also reported as follows:

The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.<sup>58</sup>

Following the Committee's recommendations, the AMA then adopted resolutions protesting "against such unwarrantable destruction of human life" and urging legislatures to revise their abortion laws.<sup>59</sup>

Around the mid- to late-nineteenth century, states did, in fact, begin to outlaw abortion without reference to quickening.<sup>60</sup> However, when the Supreme Court took up the issue of abortion in *Roe v. Wade* and considered the state's interests in interfering with the previously established privacy rights of the mother, it was unclear *why* the State of Texas had outlawed abortion. States had not definitively declared that unborn children were persons entitled to legal rights. The Court noted that the state courts that had interpreted their abortion laws in the late nineteenth and early twentieth centuries had focused on the state's interest in protecting the woman's health rather than in preserving the embryo and fetus.<sup>61</sup>

Since the Court's exclusion of the unborn from the definition of "person" based on its legal-historical analysis precluded the Court from easily deciding the case in favor of the State on Fourteenth Amendment grounds, the Court went on to consider the State's argument that it—the State—had a compelling interest in

---

Criminal Abortion's report, 1859).

58. *Id.* at 141–2 (citing AMA Committee on Criminal Abortion's report, 1859).

59. *Id.* at 142 (citing AMA Committee on Criminal Abortion's report, 1859).

60. *Id.* at 139 ("Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.") (citing Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U. Ill. L. F. 177, 179).

61. *Id.* at 410 U.S. at 151–52.

protecting human life, including that of the unborn. Justice Blackmun concluded:

“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>62</sup>

This approach may have been sensible, in light of the Court’s institutional incompetence to make a determination for society as to when life begins. Justice Scalia, for example, has expressly called for the Court to leave this sensitive, science-based determination to the political process for both legal and pragmatic reasons.<sup>63</sup>

#### B. *What Science Tells Us*

In light of our current scientific and medical understanding, it is hardly deniable that biological life begins at the time of conception.<sup>64</sup> Consider the following scientific conclusions from professional embryology textbooks and research articles:

From the moment of sperm-egg fusion, a human zygote acts as a complete whole, with all the parts of the zygote interacting in an orchestrated fashion to generate the structures and relationships required for the zygote to continue developing towards its mature state. Everything the sperm and egg do prior to their fusion is uniquely ordered towards promoting the binding of these two cells. Everything the zygote does from the point of sperm-egg fusion onward is uniquely ordered to prevent further binding of sperm and to promote the preservation and development of the

---

62. *See id.* at 159.

63. *See Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 520–21 (1991) (Scalia, J., concurring).

64. For purposes of clarity and to simplify the argument to its legal essence, this article will use the term “conception” to describe the moment when a distinct human life begins. While “conception” is often erroneously defined to mean implantation of the fertilized egg, the term is used herein to describe the culmination of the process of events which results in a new, living, genetically unique, single-cell human being, human embryo, human organism or human individual who immediately directs his or her own specifically human functions, activities and development.

zygote itself. The zygote acts immediately and decisively to initiate a program of development that will, if uninterrupted by accident, disease, or external intervention, proceed seamlessly through formation of the definitive body, birth, childhood, adolescence, maturity, and aging, ending with death. This coordinated behavior is the very hallmark of an organism.<sup>65</sup>

A zygote is the beginning of a new human being. . .<sup>66</sup>

It is the penetration of the ovum by a spermatozoan and resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual.<sup>67</sup>

The zygote thus formed represents the beginning of a new life.<sup>68</sup>

Every time a sperm cell and ovum unite a new being is created which is alive and will continue to live unless its death is brought about by some specific condition.<sup>69</sup>

These texts reveal the medical community's consensus as to when life begins. Even at the time *Roe* was decided, there was no dearth of *medical* evidence demonstrating that human life was present and distinct from the moment of conception. There was, however, an absence of clear *legislative* guidance as to the point at which states recognized human beings as "persons" for general purposes under state law.

### C. *Legal Treatment of the Unborn Child Since Roe v. Wade*

The legal landscape has changed. A surge of legislation in recent years provides increasing levels of protection for the unborn in a variety of contexts. In 2009 at least seven states considered

---

65. Maureen L. Condic, Westchester Inst. For Ethics & the Human Person, When does Human Life Begin?: A Scientific Perspective (2008). Maureen Condic is an Associate Professor of Neurobiology and Anatomy at the University of Utah School of Medicine.

66. Keith L. Moore & T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology* 2 (6th ed. 1998).

67. Bradley M. Patten, *Human Embryology* 43 (3rd ed. 1968).

68. J.P. Greenhill & Emanuel A. Friedman, *Biological Principles and Modern Practice of Obstetrics* 23 (1974).

69. EDITH LOUISE POTTER & JOHN M. CRAIG, *PATHOLOGY OF THE FETUS AND INFANT*, vii (3rd ed. 1975).

legislation requiring medical professionals to inform women that their unborn children may feel pain during an abortion.<sup>70</sup> The State of Utah has passed a law requiring abortion providers to offer a woman the option of providing anesthesia for her unborn child at or after 20 weeks' gestation.<sup>71</sup> Twenty-three states introduced fetal pain bills in 2005 or 2006.<sup>72</sup> Those bills have already passed in Arkansas, Georgia, and Minnesota.<sup>73</sup> These laws implicitly recognize that unborn children are capable of feeling pain, and that we have a duty to treat these unborn human beings in a humane manner.

By federal law and the law of thirty-six states, fetal homicide is a crime (abortions excepted per Supreme Court precedent).<sup>74</sup> At least 21 states' fetal homicide laws apply from the time of conception.<sup>75</sup>

States are also increasingly recognizing the humanity of the unborn child for purposes of civil law. Thirty-five states allow a cause of action to be maintained for the wrongful death of an unborn child. Six of these states recognize the cause of action prior to viability.<sup>76</sup>

In June of 2008, the United States Court of Appeals for the

70. Americans United for Life, *2009 State Legislative Session in Review*, (Apr. 23, 2008), <http://www.aul.org/2008/04/2009-state-legislative-sessions-in-review/>.

71. *Id.*

72. See <http://www.lifesite.net/ldn/2006/feb/06020903.html> (last visited June 15, 2007).

73.

74. 18 U.S.C. § 1841 (2006); ALA. CODE (2010)ALASKA STAT. § 11.81.900(b) (2010); ARIZ. REV. STAT. § 13-1102 (2010); . § 5-1-102(13)(B(b) (2010); AL CODE ) (West 2010)FLA. STAT. ANN. § 782.09 (West 2010); GA. CODE ANN. § 16-5-80 (2010); ANN. (2010)) (2010); (2010) (2010); KAN. STAT. ANN. § 21-3452 (2010); ANN. (West 2010)LA. REV. STAT. ANN. § (2009)TIT., (2009)MD. CODE ANN. CRIM. LAW § §2-103(b) (West 2010); Massachusetts (*see* , 536 N.E.2d 571 (Mass. 1989)); MICH. COMP. LAWS § 750.322-.323 (2010). MISS. CODE ANN. § 97-3-19, -37 (2010); (2010). § 28-391- to -394 (2010) § 200.210 (2009)N.D. CENT. CODE §§12.1-17.1-01 to 12.1-17.1-04 (2009) (West 2010)OKLA. STAT. TIT. 21 § 691 (2010). §§ 2601-2609 (West 2010); R.I. GEN. LAWS § 11-23-5 (2010) (2009)S.D. CODIFIED LAWS § 22-16-1, -1.1, -15(5), -20, -41 (2010)TENN. CODE ANN. § (2010). TEX. PENAL CODE ANN. §§ 1.07(a)(26), 19.01 (West 2009). (West 2010);,; (2010)) (West 2010) (2010); . §940.01 (2009). National Conference of State Legislatures, *Fetal Homicide State Laws*, <http://www.ncsl.org/default.aspx?tabid=14386#sl> (last visited December 9, 2010)

75. Alabama; Arizona; Arkansas; Georgia; Idaho; Illinois; Kansas; Kentucky; Louisiana; Massachusetts; Minnesota; Nebraska; North Dakota; Ohio; Oklahoma; Pennsylvania; South Carolina; South Dakota; Texas; Utah; West Virginia; Wisconsin. For a description of the specific state statutes, see cited *supra* note 75.

76. Georgia; Illinois; Louisiana; Missouri; South Dakota; West Virginia. For a complete discussion of this topic and a description of particular state laws, see source cited *supra* note 77.

Eighth Circuit upheld a South Dakota law requiring that doctors inform pregnant women seeking abortions that the abortion would “terminate the life of a whole, separate, unique, living human being.”<sup>77</sup> Notably, while Planned Parenthood argued that abortionists should be given an opportunity to disassociate themselves from this required disclosure, the Court rejected that argument because Planned Parenthood could not demonstrate that the disclosure was untruthful or misleading.<sup>78</sup> The court stated:

In the absence of some showing that there are particular circumstances in which a successful abortion will do something other than terminate the life of a whole, separate, unique, living member of the species of *Homo sapiens* during its embryonic or fetal age, Planned Parenthood cannot demonstrate that the physician’s ability to disassociate is implicated in this case.<sup>79</sup>

As indicated in the discussion of the Supreme Court’s *Gonzales* decision (*supra*), even the High Court appears to have resolved some of its doubts as to when human life exists.

#### *D. Looking Forward*

There is widespread agreement in the scientific community that biological life does, in fact, begin at conception, and this evidence is now being recognized in a broad variety of legal contexts. Under these circumstances, the Supreme Court’s abortion jurisprudence is increasingly exposed as morally and logically suspect. The Court’s decision in *Roe* placed Fourteenth Amendment protection off limits for the unborn, and yet it is clearly unjust for certain human beings to be utterly without fundamental rights solely because of their phase of biological development. Fortunately, it remains within the province of the states to ensure that state fundamental rights are available to *all* human beings, at every stage of development. Legislative conferral of personhood on the unborn through an exercise of

---

77. *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

78. *Id.* at 736.

79. *Id.* at 758 n.10.

legitimate state power would ensure that the state will recognize as a matter of law what has always been true as a matter of science—that unborn children are persons, rather than property.

#### IV. THE PERSONHOOD STRATEGY

The main objective of a personhood statute or constitutional amendment is to fill the gap in a state's laws that was identified by the Supreme Court in *Roe v. Wade*. Recall that the State of Texas argued unsuccessfully that the unborn child was a "person" protected by the Fourteenth Amendment of the United States Constitution. Because the State could not point to any definitive source of *state* law recognizing the unborn child as a person, the argument that abortion interfered with the rights of the unborn child was at an end. By enacting a statute or constitutional amendment specifically recognizing the humanity of unborn human beings and clarifying that all human beings enjoy fundamental rights under the state's laws, states can provide the unborn with a source of fundamental rights independent of the Fourteenth Amendment.

Moreover, the definition of "persons" in state law to include all human beings is an important civil rights objective with implications beyond the abortion debate. Failure to define the term in this fashion leaves the judiciary to decide, without any legislative guidance, who qualifies as a "person" under state law. Failure to fill the gap leaves the door open for activist courts to define personhood in a more restrictive way that might definitively exclude some members of the human family based on age, disabilities or conditions of dependency.

Since the *Roe* Court contracted the term "person" to exclude human beings at the beginning of their biological development for purposes of the Fourteenth Amendment, there are no apparent guarantees against further judicial tinkering with the term to produce results that may be unconscionable to many Americans. While courts are confined to operate within the framework of constitutional limitations and thus could not arbitrarily define personhood in a way that obviously conflicts with established principles, it is certainly conceivable that a court might define life or death at the margins in a way that violates the collective

conscience of our society.<sup>80</sup>

While there are undoubtedly numerous ways of wording a statute or amendment to achieve the objectives discussed above, but the following analysis will focus specifically on a “Model Personhood Bill” taken from the Preamble that the Supreme Court left standing in *Webster v. Reproductive Health Services*.<sup>81</sup> The Missouri statute is an ideal model because it is tried and true, having been interpreted and applied by Missouri courts for over 20 years now without resulting in any negative unintended consequences.<sup>82</sup>

## V. A MODEL PERSONHOOD BILL<sup>83</sup>

### 1. The general assembly of this state finds that:

- (1) The life of each human being begins at conception;
- (2) Unborn children have protectable interests in life, health, and well-being;
- (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. The laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term “unborn children” or “unborn child” shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

---

80. For a fuller discussion of this idea, see Alec Walen, *The Constitutionality of States Extending Personhood to the Unborn*, 22 CONST. COMMENT. 161, 174–75 (2005).

81. 492 U.S. 490 (1989).

82. The states of Illinois and Louisiana have also enacted laws declaring that life begins at conception and conferring personhood upon human beings from the time of conception. See 720 ILL. COMP. STAT. 510/1 (2010) and LA. REV. STAT. § 40:1299.35.0. (2009).

83. The language of the model bill is taken from MO. REV. STAT. § 1.205 (2010). This is the “preamble” that was left standing by the United States Supreme Court in *Webster* cited *supra* note 84 at 504.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

#### VI. DO STATES HAVE THE AUTHORITY TO ENACT PERSONHOOD MEASURES?

The Tenth Amendment to the United States Constitution declares plainly that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Justice Kennedy has explained the relative powers of the Federal and State governments this way:

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document “specifically recognizes the States as sovereign entities.” . . . The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.

. . . .

The States thus retain “a residuary and inviolable sovereignty.” (citation omitted) They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.<sup>84</sup>

Because state legislatures are the repositories of all powers not specifically given to the federal government, they are vested with the power to declare that a new human being exists from the time of conception and that unborn children are thus persons entitled to the benefits of state constitutional guarantees.

Even in *Roe v. Wade*, the Court did not deny that Texas *could*

---

84. *Alden v. Maine*, 527 U.S. 706, 713-15 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71, n. 15 (1996); *THE FEDERALIST* NO. 39, at 245 (James Madison) (J. Cooke ed., 1961)).

have enacted laws that afforded legal rights to the unborn. What the Court found in *Roe* was that Texas, like other states, *had not*, in fact, treated the unborn as persons with rights.<sup>85</sup>

Recall that, by a legal fiction, even corporations have been adjudged “persons” for purposes of fundamental rights analysis. In *Santa Clara County v. Southern Pacific Railroad*, the Supreme Court summarily affirmed the decisions of lower courts holding that corporations qualify as persons for purposes of equal protection under the Fourteenth Amendment.<sup>86</sup> Lower courts had reasoned that the Fourteenth Amendment was “a perpetual shield against all unequal and partial legislation by the states, and the injustice which follows from it, whether directed against the most humble or the most powerful . . .”<sup>87</sup> Because corporations were merely aggregations of individual people, the court reasoned, they should be treated as “persons” for equal protection analysis.<sup>88</sup> This holding, however, has not been without criticism. Justice Black, for instance, has emphasized that the purpose of the Fourteenth Amendment was to “protect weak and helpless human beings” rather than to provide benefits to corporations.<sup>89</sup>

In light of this original purpose behind the adoption of the Fourteenth Amendment, surely embryos and fetuses have a far superior claim to its protections than do corporations. However, the recognition of the “personhood” of corporations for purposes of equal rights analysis underscores the broader fact that legal personhood—even for federal constitutional purposes—is a dynamic concept that is amenable to expansion and retraction as justice, in the Court’s view, requires.

#### VII. PROBABLE EFFECTS OF STATE PERSONHOOD LEGISLATION

The aim of the model state personhood bill is to confer legal personhood upon the unborn, along with the concomitant rights enjoyed by other “persons” under the state’s constitution and laws. This personhood approach to pro-life legislation has the substantial benefit of focusing on a set of positive rights for a class of people

---

85. See Walen, *supra* note 82, at 168.

86. 118 U.S. 394 (1886).

87. *County of San Mateo v. Southern Pacific Railroad Co.*, 13 F. 722, 740 (C.C.D. Cal. 1882).

88. *Id.* at 743–44.

89. *Connecticut General Life Insurance v. Johnson*, 303 U.S. 77, 87 (1938).

(the unborn), rather than attacking the judicially created privacy rights of another class of people (their mothers).

*A. The Model Bill Would Not Restrict a Woman's Existing Abortion Rights*

The model bill would do nothing to restrict abortion. Indeed, it does not even mention abortion. The bill employs the identical language of the Preamble that the Supreme Court left standing in *Webster v. Reproductive Health Services*.<sup>90</sup> In defending the law, Missouri pointed out that the language “imposed no substantive restrictions on abortions.”<sup>91</sup> The Court stated:

“It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. Until then, this ‘Court is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.’”<sup>92</sup>

The use of the language, “[s]ubject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state” makes it clear that the law does not create any direct conflict with the abortion status quo.

*B. Creation of Wrongful Death Cause of Action*

One immediate effect of a personhood law would be the creation of a cause of action for the wrongful death of an unborn child in a state that does not already recognize this cause of action. Where left to interpretation, courts generally construe state wrongful death statutes to provide no cause of action for a stillborn child, even where the death results from the tortious act of a third

---

90. *Webster v. Reproductive Health Services*, 492 U.S. 490, 500 (1989).

91. *Id.* at 505.

92. *Id.* at 506-07 (quoting *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900)).

party.<sup>93</sup>

This same result followed the passage of the Missouri statute after which the model bill is fashioned; the Missouri Supreme Court found that pursuant to the statute, a wrongful death claim could be stated for a nonviable unborn child. The Missouri court found that it was reasonable for the legislature to adopt this canon of interpretation directing that the time of conception and not viability is the determinative point at which the legally protectable rights, privileges, and immunities of an unborn child should be deemed to arise.<sup>94</sup>

As mentioned earlier, 35 states already recognize a cause of action for the wrongful death of an unborn child.<sup>95</sup> Six of these states recognize the cause of action prior to viability.<sup>96</sup>

*C. Looking Forward: Creating the Foundation for a New Era in Abortion Jurisprudence*

Notwithstanding its inadequacy to outlaw abortion of its own accord, the type of personhood bill modeled herein could still carry great weight as a step in the logical process of outlawing abortion. Once the personhood of every human being, born and unborn, is firmly entrenched in a state's code of laws, the statutes permitting abortion will logically demand reexamination. Moreover, the legislative determination that unborn children are legal persons for purposes of state law may provide the necessary change in the legal-factual context to render an abortion prohibition legally sustainable.

VIII. CONFRONTING *ROE V. WADE*

We know from *Webster* that a pure personhood bill, worded similarly to the Missouri Preamble challenged in that case, is almost certain to be considered unripe for judicial decision if it is challenged as an infringement of the woman's right to an abortion. Again, the Supreme Court in *Webster* held:

It will be time enough for federal courts to address the

---

93. See *Modaber v. Kelley*, 232 Va. 60, 66 (1986) ("In Virginia, the law is established that an unborn child is not a 'person' within the meaning of our wrongful death statute." (citing *Lawrence v. Craven Tire Co.*, 210 Va. 138, 140-42 (1969))).

94. *Id.* at 92.

95. *Supra* note 77.

96. *Supra* note 78.

meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. Until then, this Court 'is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'<sup>97</sup>

States can therefore revise their laws to reflect the scientific reality of human life at conception and formally extend legal personhood to all human beings without advocating reversal of *Roe v. Wade*. The recognition of state personhood rights for unborn children does not, on its own, challenge *Roe*'s recognition of a woman's fundamental privacy right that encompasses reproductive decisions.

However, if a state legislature should choose at some later juncture to restrict abortion in a way that goes beyond what existing precedent allows, finding that the state-conferred right to life of the unborn outweighs the mother's federal privacy right, *Roe* and its progeny are certainly implicated. In such a case, it appears that the original balancing test applied in *Roe v. Wade* would demand reconsideration due to a fundamental change in the legal-factual context. Now, in addition to weighing the mother's privacy rights against the state's interests in protecting a potential human life, the court would be asked to add to the scale the rights of the unborn child as a distinct person under state law. By adopting a law such as the model personhood bill contained herein, the state would have altered a fundamental premise of the *Roe v. Wade* holding—that there was no source of rights for the unborn child as a distinct person. Now the state-conferred rights of the unborn person herself would demand consideration in the balancing test that has heretofore ignored them.

#### A. *Lessons Learned From Doe v. Israel*

Shortly after the Supreme Court's ruling in *Roe*, the Rhode Island legislature passed a law prohibiting abortions except when necessary to preserve the life of the mother.<sup>98</sup> The statute included a legislative finding that life begins at conception and "that said human life at said instant of conception is a person within the

---

97. *Webster v. Reproductive Health Services*, 492 U.S. 490, 506–07 (1989) (quoting *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900)).

98. R. I. Gen. Laws § 11-3-1 – 11-3-5 (March, 1973).

language and meaning of the *fourteenth amendment of the Constitution of the United States*.”<sup>99</sup> In *Doe v. Israel*, the statute was ruled unconstitutional by a federal district court and the United States Court of Appeals for the First Circuit. The Supreme Court denied the state’s petition for certiorari.<sup>100</sup>

There are two significant distinctions between this failed experiment of the Rhode Island legislature in 1973 and the personhood strategy outlined herein. First, and most significantly, the Rhode Island law sought to define unborn children as persons *under the Fourteenth Amendment to the United States Constitution*, a possibility explored and explicitly rejected by the Supreme Court in *Roe v. Wade*. As the United States Supreme Court has the final word on the interpretation of the United States Constitution, it may well be futile for state legislatures to attempt to enlarge the universe of “persons” under the Fourteenth Amendment.<sup>101</sup> On the other hand, state legislatures presumably may adopt rules of construction regarding who is a “person” for purposes of state law. Because this kind of rule of construction—applying to the state’s own laws—would not directly conflict with any provision of federal law or any Supreme Court holding, it would not implicate the Supremacy Clause.<sup>102</sup>

Second, by combining the finding that life begins at conception with an abortion ban in a single statute, the State of Rhode Island somehow does not *seem* to be genuinely treating unborn children as “persons in the whole sense” for general purposes as discussed in *Roe*.<sup>103</sup> The approach outlined herein may therefore offer an advantage in that the state would be firmly committed to treating unborn children as persons generally upon passage of the Missouri-style law. Only then might the state choose to move into uncharted territory by restricting abortion.

### B. Possible Outcomes

One of the most promising aspects of the personhood strategy discussed herein is that it could create an opportunity for the

---

99. *Id.* at § 11-3-4 (emphasis in original).

100. *Doe v. Israel*, 358 F.Supp. 1193 (D. R.I. 1973), stay pending appeal denied, 482 F.2d 156 (1st Cir. 1973), cert. denied, 416 U.S. 993 (1974).

101. See Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 102, 103 (2005)

102. U.S. CONST. art. VI, cl. 2.

103. *Roe*, 410 U.S. at 162.

federal judiciary to gracefully return the abortion issue to the states *without* overturning *Roe v. Wade*. If a state legislature should ultimately ban abortion after having first enacted a personhood bill worded similarly to the language of the model bill herein, a reviewing court could uphold the ban while leaving *Roe* in place. It could do this by seizing upon the significant difference in facts—that while Texas had never treated the unborn as “persons” in the whole sense either *de jure* or *de facto*, the state now before the reviewing court would point to a law effecting precisely that treatment. Thus, the court might ultimately uphold an abortion ban in a personhood state while leaving *Roe* and its progeny to govern non-personhood states.

Because of the existence of a new source of rights for the unborn, the reviewing court would presumably endeavor to balance the state-conferred fundamental rights of the unborn and the state interest in protecting the unborn child against the federal privacy rights of the mother. It seems logical to assume that the unborn child’s fundamental right to life, even though based on the state constitution, would take precedence over the mother’s federal privacy rights. And yet, it must be confessed, this is the greatest uncertainty of the personhood approach.

The question of balancing state fundamental rights against federal rights was touched upon in the oral reargument of *Roe v. Wade*:

**Justice Byron R. White:** Do you think a state interest, if it’s only a statutory interest or a constitutional interest under the state law, can never outweigh a federal constitutional right, is that it?

**Ms Sarah Weddington:** I think— it would seem to me that—

**Justice Byron R. White:** So all the talk of compelling state interests is beside the point. It can never be compelling enough.

**Ms Sarah Weddington:** If the state could show that the fetus was a person under the Fourteenth Amendment or under some other amendment or part of the constitution, then you would have the situation of trying— you would have a state compelling interest which, in some instances, can outweigh a fundamental right. This is not the case in this particular

situation.<sup>104</sup>

As the Court first announced in *Roe*, the state's interest in protecting "potential" life and in protecting the mother's health *does* become compelling enough to outweigh the mother's federal privacy right at a certain point in the pregnancy. So these reproductive privacy rights are clearly not invincible. Arguably, the existence of a distinct set of individual rights for the unborn under state law both strengthens the state's interest in restricting abortion and, more importantly, forms an independent counterweight to the mother's privacy rights.

In a society as protective of individual liberty as ours, it is logical to expect an individual's fundamental rights under state law (the unborn child's right to life) to weigh more heavily in the balancing test than the state's interest in protecting the mere "potential" for life. Thus, surely the abortion balancing test in a state that has codified a Missouri-style law will, at the very least, be *different* than it would be in a state without the law.

It would not be unprecedented for a court to hold that an individual's right under state law alone outweighed a conflicting federal constitutional right. An individual's state-conferred right of publicity, for instance, has been held to outweigh the media's First Amendment right to broadcast events in some circumstances.<sup>105</sup>

Apart from the context of First Amendment rights competing with reputational interests (e.g., privacy or libel/slander cases), it is difficult to produce analogous scenarios in which courts balance the federal rights of one person against state or common law rights of another person. This is because civil liberties generally are weighed against government interests. But if the exercise of state power to define "persons" for purposes of state law to include unborn children is legitimate, then presumably the federal courts may not simply ignore the designation in evaluating other state laws. Therefore, a state personhood law can be expected to

---

104. Transcript of Oral Argument, *Roe v. Wade*, 410 U.S. 113 (No. 70-18), available at [http://oyez.org/cases/1970-1979/1971/1971\\_70\\_18/reargument](http://oyez.org/cases/1970-1979/1971/1971_70_18/reargument) (last visited Monday, October 25, 2010).

105. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (holding that the First and Fourteenth Amendments did not require the State of Ohio to provide broadcasters with a privilege that outweighed a performer's state-based right to publicity).

influence the determination of whether a future abortion restriction unduly burdens a woman's reproductive privacy rights.

Of course, it is also possible that a reviewing court might find that while the conferral of state constitutional rights upon the unborn is within the province of the state legislature, a woman's right to privacy under the United States Constitution still outweighs the conflicting state constitutional rights of the unborn person and the state interest in protecting those rights. Such a holding would arguably manifest an impoverished view of federalism principles in that it would render the most fundamental state rights of the unborn—though properly conferred—meaningless. Moreover, such a holding would undermine the states' prerogative to legislate effectively in an area upon which the United States Constitution is clearly silent.

The personhood strategy creates a valuable opportunity for the federal judiciary to return the abortion issue to the states while avoiding overturning a watershed precedent, but it might also be seen as offering an appropriate case for the Court to effect the demise of a widely-criticized opinion. Stare decisis, the legal principle by which case precedents are to be treated as law for future decisions, may appear to be a formidable obstacle to those who lament *Roe* and its progeny. But upon closer examination, it becomes clear that the Supreme Court's abortion jurisprudence is peculiarly amenable to deviation from the doctrine of stare decisis. The following quote from Chief Justice Rehnquist's concurrence and dissent in *Planned Parenthood v. Casey*, which was joined by Justices White, Scalia and Thomas, is instructive on this point:

In our view, authentic principles of stare decisis do not require that any portion of the reasoning in *Roe* be kept intact. "Stare decisis is not . . . a universal, inexorable command," especially in cases involving the interpretation of the Federal Constitution. Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depart from a proper understanding" of the Constitution. Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the

question.<sup>106</sup>

The abortion issue would not be the first context in which changes in circumstances have demanded that the Supreme Court deviate from an earlier ruling. A ready model is found in the landmark decision of *Brown v. Board of Education*.<sup>107</sup> In that case, the Court reversed the doctrine of “separate but equal” accommodations for blacks and whites that it had previously sanctioned in *Plessy v. Ferguson*.<sup>108</sup> “In approaching this problem,” wrote Chief Justice Warren for the Court, “we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”<sup>109</sup> The unanimous Court found that segregated public education had detrimental effects on African-American children.<sup>110</sup> Thus, the Court explicitly rejected contrary findings from *Plessy*, declaring that they must give way to a new social order.<sup>111</sup>

At least three members of the Supreme Court have examined the analogy between the Court’s segregation cases and its abortion precedents. In *Casey*, Justices O’Connor, Kennedy and Souter penned an opinion that explained the *Brown* Court’s willingness to depart from stare decisis this way:

Society’s understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, we must also recognize that the *Plessy* Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required. . . . In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior

---

106. *Casey*, 505 U.S. at 954–55 (Rehnquist, C.J., concurring in part and dissenting in part) (citations omitted).

107. 347 U.S. 483 (1954).

108. 163 U.S. 537 (1896).

109. *Brown*, 347 U.S. at 492–93.

110. *Id.* at 494.

111. *Id.* at 494–95.

case as a response to the Court's constitutional duty.<sup>112</sup>

In *Casey*, however, the Court was not presented with the type of decisive legislative changes since *Roe v. Wade* that would have manifested a serious intention of state legislatures to treat unborn humans as persons from the moment of conception. The Court thus found no cause for the kind of departure from *Roe* that *Brown* had been from *Plessy*.

Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.<sup>113</sup>

The personhood strategy might present an appropriately comprised Supreme Court with an ideal basis for starting a new, state-specific chapter in American abortion jurisprudence.

## IX. OBJECTIONS AND RESPONSES

### A. *How could a personhood bill survive legal challenge under Roe and Casey?*

It is important to keep in mind that a pure personhood bill does nothing to prohibit abortion. In fact, since current law specifically permits abortion under the framework developed by *Roe v. Wade* and its progeny, further legislative action would be required before abortion could be criminalized.

The fashioning of the model personhood bill after the existing Missouri preamble challenged in *Webster*, and the inclusion of the same limiting language, makes the statute unripe for review under the Court's abortion cases. The statute would simply pose no

---

112. *Casey*, 505 U.S. at 863-64 (citing *Plessy v. Ferguson*, 163 U.S. 537, 552-564 (1896) (internal citations omitted) (emphasis added)).

113. *Id.* at 864.

obstacle to a woman's procurement of an abortion.<sup>114</sup>

*B. If Unborn Children are Treated as Persons, Wouldn't Mothers, Abortionists, or third parties who cause the Death of an Unborn Child be Subject to Criminal Homicide Charges?*

No. First of all, the state's existing abortion statutes would continue to control the treatment of abortion for purposes of criminal law. Where mothers and abortionists comply with those statutes, they cannot possibly be prosecuted for their conduct because they are protected by the notice requirement of the Fourteenth Amendment. Where a third party intentionally kills an unborn child without the mother's consent, the criminal liability of the third party would be controlled by the state's fetal homicide statute. There is some possibility that the personhood bill might allow criminal prosecution of the third party in a state with no fetal homicide statute.

*C. If Unborn Children are Treated as Legal Persons, won't the State's Property and Tort laws be Affected?*

There are two responses to this objection. First, the recognition of legal personhood for unborn children will not necessarily require the unborn to be treated exactly the same as born persons for all purposes. Under well-established equal protection principles, inequalities in the law need only be justified by legitimate state interests. "[H]istoric distinctions between property, tort, and criminal rights of born and unborn persons would be found to be well justified."<sup>115</sup> Second, *Roe v. Wade* notwithstanding, the trend in property, tort and even criminal law over the past fifty years has been toward greater recognition of the rights of the unborn. So, in many legal contexts, unborn children are already treated as legal persons. It is unlikely that a personhood bill would work any change in these areas of the law other than those changes that are intended or desirable.<sup>116</sup>

*D. What about the line in Roe v. Wade where the Court stated,*

---

114. See *Webster* at 506–07.

115. James Bopp, Jr., Lynn D. Wardle, et al., *The Effects of a Human Life Amendment on Federal and State Law*, in *RESTORING THE RIGHT TO LIFE—THE HUMAN LIFE AMENDMENT*, 71–72 (James Bopp, Jr. ed., 1984).

116. For a fuller discussion of this subject, see *id.* at 72–74.

*“In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”*<sup>117</sup>

In this portion of the opinion, the Supreme Court had already determined that unborn children did not fall within the definition of “person” for purposes of the Fourteenth Amendment to the United States Constitution. The Court was considering the Attorney General’s argument that because life began at conception, *the State* had a compelling interest in protecting that life from the time of conception. The Court determined that whatever the State’s view as to when life begins, that view could not support any *State* interest compelling enough to outweigh the woman’s right to an abortion. So the Court was not discussing an actual conferral of legal personhood by the State legislature. A state personhood bill would create a new set of rights—including the right to life—to be balanced against the mother’s privacy rights.

*C. Wouldn’t a State Personhood Measure Constitute a ban on Oral Contraception?*

No. Oral contraception continues to be readily available in states such as Missouri that already recognize unborn children as persons for purposes of state law.

Even if the state chose to view the prescription and ingestion of oral contraceptives as a form of abortion (which is unlikely for a variety of reasons), abortion would continue to be legal at this early stage by virtue of other state laws and by Supreme Court precedent. Moreover, due process requirements preclude the criminal prosecution of any individual without clear, specific guidance as to what behavior is proscribed. This bill would not meet those standards with regard to conduct that was legal prior to its passage.

*F. Wouldn’t a State Personhood Measure Hinder the Operations of Fertility Clinics?*

No. In vitro fertilization continues to be readily available in states such as Missouri that have already conferred legal personhood upon unborn children.

---

117. *Roe*, 410 U.S. at 162.

The only potential application of this bill to in vitro fertilization would be limited to a philosophical demand for the reexamination of the disposition of unused embryos. Currently, this practice is generally governed by the directives of the biological parents contained in the medical facility's informed consent forms. Options include preservation of the embryos for future use, donation to other couples, or discarding without transfer.

While the recognition of the humanity and legal personhood of human embryos would certainly carry moral implications for destruction of unused embryos in fertility clinics, a personhood bill such as the model discussed herein would not and could not criminalize that practice. This is because due process requirements preclude the criminal prosecution of any individual without clear, specific guidance as to what behavior is proscribed. This bill would not meet those standards with regard to conduct that was legal prior to its passage, particularly in light of the fact that the direct, intentional killing of an unborn child through abortion would continue to be legal at this early stage under other state laws.

#### X. CONCLUSION

Scientific evidence overwhelmingly indicates that new human life, distinct from the mother, exists from the moment of conception. Nonetheless, unless the Supreme Court reverses its holding in *Roe v. Wade*, unborn children will not enjoy the right to life under the Fourteenth Amendment to the United States Constitution. States do, however, retain the prerogative to specify by legislative act or constitutional amendment that unborn children are juridical "persons" possessed of fundamental rights for purposes of state law.

State personhood measures such as the model bill herein establish a positive set of rights for unborn children without directly challenging the rights of any other class of persons. However, once a state recognizes unborn children as "persons" who enjoy fundamental rights, the state will then be left to confront the question of whether the humanity of the unborn warrants specific restrictions on a woman's right to privacy that go beyond those permitted by the Supreme Court's abortion jurisprudence. If so, the state will invite a confrontation with *Roe v. Wade* and its

2011]

*THE PERSONHOOD STRATEGY*

359

progeny.

The personhood strategy discussed herein presents an opportunity for the Court to allow states to take back the abortion issue by filling the gap in state law that was identified in *Roe v. Wade*—the definition of “persons” for general state law purposes. The Supreme Court might reasonably conclude that while *Roe* and its progeny remain in place, states that truly recognize unborn human beings as legal “persons” may legitimately determine that the unborn person’s right to life under state law outweighs the Fourteenth Amendment privacy rights of the mother.