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

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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.[1]

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 lag iNDl hurem:16

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

The appellee and certain amici argue that the fetus is a "person"

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.[14] 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.[15]

Center for Reproductive Health[26] that "a State may not adopt one theory of when life begins to justify its regulation of abortions."[27] 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."[28] 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.[29]

In 1992, the Supreme Court again addressed a State's attempts to regulate abortion in *Planned Parenthood v. Casey*.[30] 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.[31]

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.[58]

Following the Committee's reccomendations, the AMA then adopted resolutions protesting "against such unwarrantable destruction of human life" and urging legislatures to revise their abortion laws.[59]

Around the mid- to late-nineteenth century, states did, in fact, begin to outlaw abortion without reference to quickening.[60] 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.[61]

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

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."[62]

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

legislation requiring medical professionals to inform women that their unborn children may feel pain during an abortion.[70] 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.[71] Twenty-three states introduced fetal pain bills in 2005 or 2006.[72] Those bills have already passed in Arkansas, Georgia, and Minnesota.[73] 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).[74] At least 21 states' fetal homicide laws apply from the time of conception.[75]

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.[76]

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, -reTT1 / Tm /Span /MCID 14 BDC BT(vie.rl(n0 Tw 8.52 0 0 8.52612 Tc80.51999 Tm(71)TjETEMC /P 1/MCID 9 BDC BT/TT174 Tw 8

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."[77] Notably, while Planned Parenthood argued that abortionists should be given an opportunity to disassociate themselves from this required disclosure, the Court rejected that

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, te 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' child was a "per righthat th61 . eenth Am

> 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

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

(the unborn), rather th

party.[93]

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.[94]

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

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*

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.'[97]

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.[98] 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*."[99] 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.[100]

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.[101] 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.[102]

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*.[103] 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

situation.[104]

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.[105]

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 (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.[106]

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.*[107] 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*.[108] "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."[109] The unanimous Court found that segregated public education had detrimental effects on African-American children.[110] Thus, the Court explicitly rejected contrary findings from *Plessy*, declaring that they must give way to a new social order.[111]

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

> case as a response to the Court's constitutional duty.[112]

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.[113]

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.

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obstacle to a woman's procurement of an abortion.[114]

B. If Unborn Xhildren 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."[115] 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.[116]

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

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 k

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.