Why State Personhood Amendments Should Be Part of the Profile Agenda

T.J. Scott
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I. INTRODUCTION

Recently, Mississippi attempted to pass a personhood amendment to its state constitution. In 2008 and 2010, Colorado attempted to pass similar amendments to its state constitution. Some in the pro-life movement view these amendments as ways to reduce or eliminate abortion. The initiatives are rooted in Justice Blackmun’s opinion in Roe v. Wade, where he stated:

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,

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for the fetus’ right to life would then be guaranteed specifically by the Amendment.\(^4\)

The argument, then, is that the appellant’s case (the pro-choice case) would “collapse” if the unborn were deemed persons because their right to life would be protected under the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^5\)

The Fourteenth Amendment protection of a right to life would trump the privacy right that the Court found in *Roe v. Wade* and create a case for overruling *Roe v. Wade* and the surrounding abortion jurisprudence. Some in the pro-life movement argue that by amending the state constitutions to include the unborn in the definition of “person,” a factual issue could be created for reexamining *Roe*. The unborn would therefore be granted the rights under the Fourteenth Amendment and would be protected from those who seek to infringe on those rights.\(^6\) However, this strategy of amending state constitutions to eliminate a right to abortion has come under scrutiny from both pro-choice and pro-life thinkers.\(^7\)

Part II of this article will summarize *Roe v. Wade*, the “Blackmun Hole,” and the potential effects of a personhood amendment. Part III will review some example personhood amendments and discuss their strengths and weaknesses. Part IV will offer a model personhood amendment which addresses the

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5. U.S. CONST. amend. XIV, § 1 (emphasis added).
weaknesses of the other examples. Part V will discuss some considerations the pro-life movement should keep in mind regarding the personhood amendment approach. Finally, I will conclude by arguing that the pro-life movement should use the proposed amendment and should actively pursue passage in each state.

II. THE ORIGIN OF THE ABORTION RIGHT AND THE “BLACKMUN HOLE”

A. THE PREMISES AND CONCLUSIONS IN ROE V. WADE

Justice Blackmun authored the seven-judge majority opinion in Roe v. Wade, the January 22, 1973 case which significantly limited a state’s ability to regulate abortion.8 The case examined and declared unconstitutional a Texas statute9 that imposed criminal sanctions on any person who helped a pregnant woman to procure an abortion.10 Justice Blackmun began by examining whether or not a right to privacy exists in the Constitution.11 Justice Blackmun found such a right in the Fourteenth Amendment but acknowledged the district court’s opinion that the right arose from the Ninth Amendment.12

Having established a right to privacy, the Court turned its focus to whether that right was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”13 The Court discussed the harms that could occur if the state denied a woman the ability to procure an abortion and concluded that there would be significant harms from this denial.14 Additionally, Justice Blackmun looked to history for a pregnant woman’s right to choose an abortion.15 Justice Blackmun’s history examined ancient attitudes,16

9. Id. at 117 n.1.
10. Id. at 164.
11. Id. at 129.
12. Id. at 153 (in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), the Supreme Court found a right to privacy in the penumbras of the Bill of Rights).
13. Id.
14. Roe, 410 U.S. at 153 (The Court discussed harms including medical problems from the pregnancy, a “distressful” life and future, psychological harm, mental and physical harms from childcare, distress from an unwanted child, familial issues with a new child, and the stigma associated with unwed motherhood. For an additional discussion of the harms of abortion and what constitutes a significant harm, see Doe v. Bolton, 410 U.S. 179, 191–92 (1973)).
16. Id. at 130 (finding that abortion was practiced in Greek and Roman times and that the little protection that was afforded to the unborn was prosecutable as a violation of the father’s
the Hippocratic Oath, common law, English statutory law, American Law, the American Medical Association, the American Public Health Association, and the American Bar Association. Based on this history, Justice Blackmun found that restrictions on right to this offspring).

17. Id. at 130–32 (finding that the Hippocratic Oath included language similar to “I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion.” However, Justice Blackmun found that the oath echoed the Pythagorean school of philosophers and was not the typical Greek view of abortion.).

18. Id. at 132–36 (finding a mixed approach to when a person came into being and when punishment should attach to abortion. Possible moments of “personhood” included the quickening and an arbitrary schedule of forty days for males and eighty days for females. Also, Justice Blackmun found that punishment for abortion was mixed in the common law, including punishment for homicide, manslaughter, felony, misdemeanor, and no punishment at all.).

19. Id. at 136–38 (finding that the first criminal abortion statute, Lord Ellenborough’s Act of 1803, punished abortion of a quick fetus as a capital crime and a pre-quick fetus as a felony. However, more recent laws, including the Infant Life (Preservation) Act of 1929, emphasized the capability of being born alive. An even more recent law, the Abortion Act of 1967, permitted abortion if the pregnancy would risk the life of the pregnant woman, injury to the physical or mental health of the pregnant woman, or injury to the physical or mental health of any existing children in the family. Additionally, the Abortion Act of 1967 allowed abortion if the unborn child was going to be born with physical or mental abnormalities, which would leave it seriously handicapped.).

20. Id. at 138–41 (finding that post-quickening abortion was first outlawed by Connecticut in 1821. Pre-quickening and post-quickening abortion was outlawed by New York in 1828, however the pre-quickening abortion was only a misdemeanor whereas the post-quickening abortion was second-degree manslaughter. In the middle and late nineteenth century, the pre- and post-quickening distinction disappeared. In the several years before Roe was decided, several states moved toward less stringent punishments for abortion.).

21. Roe, 410 U.S. at 141–44 (finding that the American Medical Association (AMA) was largely anti-abortion in the late nineteenth century as the medical community believed it destroyed human life. However, in 1967, the Committee on Human Reproduction softened its approach where there was evidence of a threat to the health or life of the mother, the child might be born with an incapacitating physical deformity or mental deficiency, or the pregnancy came from rape or incest. Finally, in 1970, the AMA embraced abortion as a “medical procedure” which “should be performed by a licensed physician.”).

22. Id. at 144–46 (finding that the American Public Health Association (APHA), in 1970, stated that abortion referrals should be rapidly and simply available, that an “important function of counseling should be to simplify and expedite the provision of abortion services,” that “psychiatric consultation should not be mandatory,” that many individuals, from “sympathetic physicians to highly skilled physicians may qualify as abortion counselors,” and that “contraception and/or sterilization should be discussed with each abortion patient.”).

23. Id. at 146–47 (finding that the American Bar Association (ABA) approved the Uniform Abortion Act which defined abortion as “the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus” and allowed an abortion by a physician licensed or practicing medicine in a hospital or by a female upon herself either within twenty weeks or after twenty weeks for the following reasons: if there is a substantial risk that it would endanger the life of the mother; would gravely impair the physical or mental health of the mother; that the child would be born with grave physical or mental defects; or the pregnancy was the result of rape or incest or statutory rape.).

abortion are either new or have been the minority view. Thus, because restricting abortion would cause significant harms and such restriction was relatively new, the Court found that a woman's right to privacy includes the right to choose whether or not to terminate her pregnancy.

The Court next turned its attention to a potentially competing right: the unborn's right to life. Texas argued that life begins at conception and, thus, that the state has a compelling interest in protecting human life from the moment of conception. However, Justice Blackmun refused to address the moment at which life begins, citing the diverging theories present in medicine, philosophy, and theology as well as the law's historic refusal to endorse any theory of life. Additionally, he refused to leave the issue to the state: "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."

Instead of answering the inherently metaphysical question, Justice Blackmun turned to a legal definition—the definition of the word "person" in the Fourteenth Amendment. The Court granted that if the child is a person within the meaning of the Fourteenth Amendment then the state would have a compelling interest in protecting the child: "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. 31 Thus, if the unborn is deemed a "person," he or she is entitled to the Fourteenth Amendment's protection of his or her right to life. In turn, the unborn's Fourteenth Amendment right to life would trump the pregnant woman's Fourteenth Amendment right to privacy and would allow for—perhaps even require—regulation of abortion by the state. 32 Justice Blackmun looked for a definition of person in the "Citizens" Clause of the Fourteenth Amendment, 33 the Due Process and Equal Protection Clauses of the Fourteenth Amendment, 34 and in other places in the Constitution. 35 Justice Blackmun found that each of these sections seem to use the word "person" in only the postnatal sense. 36 Taken together with the history outlined above, Justice Blackmun found that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 37

Based on this definition of the word "person", Justice Blackmun found only a limited state interest in protecting the potential life of the unborn and an alternate state interest in protecting the life of the mother. 38 These state interests "grow in substantiality as the woman approaches term and, at a point during pregnancy, each

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31. Id. at 156–57.
32. Id. at 159.
33. The "Citizenship Clause in the Fourteenth Amendment reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.
34. The Due Process clause of the Fourteenth Amendment reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
35. Roe, 410 U.S. at 157 (the Court discusses other places including the qualifications for representatives and senators (U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3), the Apportionment Clause (U.S. CONST. art. I, § 2, cl. 3), the migration and importation provision (U.S. CONST. art. I, § 9, cl. 1), the Emolument Clause (U.S. CONST. art. I, § 9, cl. 8), the electors provisions (U.S. CONST. art. II, § 1, cl. 2), the qualifications for the office of the president (U.S. CONST. art. II, § 1, cl. 5), extradition provisions (U.S. CONST. art. IV, § 2, cl. 2), the superseded Fugitive Slave Clause (U.S. CONST. art. IV, § 2, cl. 3, repealed by U.S. CONST. amend. XIII) the Fifth Amendment, Twelfth Amendment, Twenty-Second Amendment, and sections two and three of the Fourteenth Amendment.).
37. Id. at 158.
38. Id. at 159.
becomes ‘compelling.’\textsuperscript{39} Thus, he arrived at the trimester framework for when each of the state’s interests became compelling.\textsuperscript{40}

Following \textit{Roe}, the right to have an abortion was relatively unimpeded. In \textit{Roe}, the Court recognized the state interests in protecting the potential life of the unborn and the life of the mother, but created an exception for “when it is necessary to preserve the life or health of the mother.”\textsuperscript{41} \textit{Doe v. Bolton} expanded the definition of “life or health of the mother” to include all factors, including “physical, emotional, psychological, [and] familial” factors, and the age of the mother.\textsuperscript{42} Thus, the state’s ability to regulate, and even proscribe, abortion following \textit{Roe} is negligible as any pregnancy impacts the emotions and family structure of a pregnant woman.\textsuperscript{43} The U.S. Senate Judiciary Committee confirmed this in 1983 when it concluded that there were no legal barriers for women to obtain abortions at any stage of their pregnancies.\textsuperscript{44} Chief Justice Warren Burger, despite siding with the majority in \textit{Roe v. Wade}, agreed that there were no legal barriers in obtaining abortion in his dissent in \textit{Thornburg v. American College of Obstetricians and Gynecologists}.\textsuperscript{45} Chief Justice Burger said that abortion was “available merely on demand” and called the state’s compelling interest at viability, as discussed in \textit{Roe}, “mere shallow rhetoric.”\textsuperscript{46}

\textsuperscript{39} Id. at 162–63.
\textsuperscript{40} Id. at 163–65 (the state’s interest in protecting the health of the mother begins at the end of the first trimester because the risk of mortality in abortion is less than the risk of mortality in child birth until the end of the first trimester. Therefore, the state has no compelling interest in regulating abortion prior to the second trimester and the “decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.” Following the first trimester, the state’s interest in protecting the health of the mother allows the state to regulate the abortion procedure, including the “qualifications of the person who is to perform the abortion . . . the licensure of that person . . . the facility in which the procedure is to be performed . . . the licensing of the facility . . . and the like.” The state’s interest in the potential life of the unborn becomes compelling when the fetus becomes viable. Viability is defined by Justice Blackmun as the fetus having the “capability of meaningful life outside the mother’s womb.” This interest allows the state to “go so far as to proscribe abortion.”).
\textsuperscript{41} Id. at 164–65.
\textsuperscript{43} Beckwith, supra note 24, at 40.
\textsuperscript{44} S. Rep. No. 98–149, at 6 (1983). See Beckwith, supra note 24, at 40.
\textsuperscript{46} Thornburgh, 476 U.S. at 783–84. See Beckwith, supra note 24, at 41.
B. THE “BLACKMUN HOLE” AND THE EFFECTS OF A PERSONHOOD AMENDMENT

Justice Blackmun’s contemplation of the personhood of the unborn and his statement “[i]f 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,” create what is now known as the “Blackmun Hole.” The idea is that by passing state constitutional amendments that define the word “person” as including the unborn, the Supreme Court will eventually be forced to review its holding in Roe. When it does, it will look at this premise—that the unborn are not included in the word “person”—and based on agreement among the states that the word “person” should include the unborn, will come to the opposite conclusion. Along with the premise changing, the conclusion will also change. The unborn would have a protectable right to life under the Fourteenth Amendment—a right that the Court would need to weigh against the privacy right of the mother. Because the right to life is the most basic and fundamental of all rights, the Court would hold that the unborn’s right to life trumps the mother’s right to privacy and therefore ban abortion.

Rita Dunaway argues that the personhood amendment is a worthwhile endeavor as it can create a factual, scientific basis from which to challenge the holding in Roe v. Wade. In particular, she points to Texas’s inability in Roe v. Wade to point to state law sources which defined the unborn child as a person. She argues that the lack of a state definition cut the argument short in front of the Supreme Court, but that a push by the states to define the unborn as persons under the Fourteenth Amendment would sufficiently shift the factual pinning on which the decision was made and warrant the Court to overrule its decision. She goes on to argue that it will allow greater civil liberties to be granted to unborn children, as courts will have a clear definition of who the state considers a person. She advocates a personhood amendment similar to the Missouri preamble

47. Roe, 410 U.S. at 156–57.
48. See What is Personhood?, supra note 6.
49. Dunaway, supra note 3, at 343.
50. Id.
51. Id.
52. Id.
which the Court refused to rule on in *Webster v. Reproductive Health Services.*

There is support for an argument that a changing factual basis could lead the court to overrule *Roe v. Wade.* In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* Justice O'Connor discusses the factual premises of *Roe* and finds that the situation has not changed enough to warrant overruling the original holding, finding a basic right to abortion. However, it is not clear that an after-the-fact change in state law would be sufficient to rule that the states clearly hold that life begins at conception. In fact, Justice Blackmun goes a long way in his history in *Roe* to discount the more modern abortion statutes and to adhere to the earlier opinions regarding human life. However, it is widely recognized today that the history that Justice Blackmun used in his *Roe* opinion was faulty. Even still, that knowledge has not called *Roe*'s fundamental holding into serious question, as others have argued that the Supreme Court's subsequent abortion jurisprudence has "made the Court impervious to any new medical, scientific, or factual understand[ing]."

Paul Linton, a private attorney specializing in constitutional law, is a strong opponent of the personhood amendments. In particular, Linton argues that: (1) personhood amendments will not bring about the change desired, (2) they are difficult to enact and will often result in defeats for the pro-life movement, (3) any legal and/or

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53. *Id.* at 344.
55. *Roe,* 410 U.S. at 152.
57. Forsythe & Presser, *supra* note 24, at 91 (quoting McCorvey v. Hill, 385 F.3d 846, 852–53 (5th Cir. 2004), discussing the inability of the Supreme Court to consider new scientific facts: "[U]nless [the Supreme Court] creates another exception to the mootness doctrine, the Court will never be able to examine its factual assumptions on a record made in court... The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women... each year, is that the facts no longer matter... Hard and social science will of course progress even though the Supreme Court averts its eyes. It takes no expert prognosticator to know that research on women's mental and physical health will yield an eventual medical consensus... That the Court's constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication.").
political defeat carries with it a cost, and therefore, (4) the pro-life movement should stop the futile efforts to pass such legislation.  In making this argument, Linton argues that a state personhood amendment cannot affect the holding in *Roe v. Wade.*

In *Roe v. Wade,* the United States Supreme Court interpreted the Fourteenth Amendment to the United States Constitution, finding that the liberty portion of the Due Process Clause of the Fourteenth Amendment included a right to privacy that protected a woman’s reproductive choices, including her right to have an abortion. Interpreting the United States Constitution, and examining the other two branches of government, has been a role played by the United States Supreme Court since *Marbury v. Madison.* The Supreme Court’s interpretation of the United States Constitution is definitive and binding. The only recourse to a Supreme Court interpretation of the Constitution is the Supreme Court overruling its precedent or an amendment to the Constitution.

The United States Constitution is the supreme law of the land and trumps any state constitutions or state or federal laws that seek to assert power in the same sphere of governance. As provided in article VI, clause 2: “[t]his Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound there by, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Supreme Court has affirmed that this clause gives the United States Constitution authority over any state constitution. Thus, attempting to change the interpretation or application of the Fourteenth Amendment through a state’s definition of person will be ineffectual.

Linton illustrates this problem with a number of examples. “Could a state, by amending its own constitution, redefine the word ‘person’ as that term is used in the Fourteenth Amendment to exclude members of a minority group or, say, aliens? Could another state, by amending its own constitution, redefine the word ‘person’ to include

60. Id.
62. Id.
63. See, e.g., *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803) (concluding that the Supreme Court had the authority to strike down a law because it violated the Constitution).
64. U.S. CONST. art. VI, cl. 2.
other species? These examples and the argument behind them demonstrate that a state constitutional amendment that contradicts the United States Constitution or the Supreme Court's interpretation of that Constitution will not challenge the interpretation. Linton is likely correct in his critique of state personhood amendments' ability to change the foundation on which Roe was built. However, although a state personhood amendment will not directly challenge Roe, the amendments can effect change.

A properly formulated state personhood amendment could have many pro-life effects. First, a personhood amendment could secure the rights of the unborn to the extent possible under current federal law. The state would recognize its right and duty to protect the unborn, a subset of persons, under the rights and privileges available in its constitution. Second, a personhood amendment could create a foundation on which the state could build in abortion regulation if Roe is ever overturned. Third, although Linton is persuasive in his belief that a personhood amendment cannot directly challenge Roe, there is a chance that a personhood amendment could give rise to a test case that would challenge and potentially overrule Roe. Fourth, a personhood amendment, if widely adopted, could create a factual challenge to Roe. As a greater number of states pass personhood amendments, Justice Blackmun's factual finding in Roe that historically and among the states the unborn were not considered "persons" would become less defensible. This would in turn require a review of his premise that the unborn are not included in the Fourteenth Amendment definition of "person" and, thereby, a review of the holding in Roe. Finally, a personhood amendment can delineate the metaphysical position of a state. This would not only challenge Justice Blackmun's factual finding but would put visitors and immigrants on notice of that state's position on the unborn. Further, it would unify the state in that metaphysical belief.

III. PAST PERSONHOOD AMENDMENTS

A. PERSONHOOD AMENDMENTS SOLELY DEFINING "PERSON"

Two states have already voted on amendments to their state constitutions which would explicitly define the meaning of the word

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67. Id.
“person.” Colorado was the first state to vote on such a personhood amendment. In 2008, Colorado voters defeated Amendment 48 with 73.2% voting “no” and 26.7% voting “yes.”68 In 2010, Colorado voters defeated Amendment 62 by a similar margin of 70.5% voting “no” and 29.4% voting “yes.”69 Amendment 48 would have added a section to the Colorado Bill of Rights which would have read:

Section 31. Person defined. As used in sections 3, 6, and 25 of article II of the state constitution, the terms “person” or “persons” shall include any human being from the moment of fertilization.70

Amendment 62 was worded similarly:

Section 32. Person defined. As used in sections 3, 6, and 25 of Article II of the state constitution, the term “person” shall apply to every human being from the beginning of the biological development of that human being.71

Section 3 of the Colorado Constitution refers to inalienable rights,72 Section 6 to equality of justice,73 and section 25 to the due process of law.74

On November 8, 2011, Mississippi rejected a similar personhood amendment with 58% voting “no” and 42% voting “yes.”75 The language would have read:

68. Amendment 48 Election Results, supra note 2.
69. Amendment 62 Election Results, supra note 2.
70. Amendment 48—Definition of Person (2008), http://www.leg.state.co.us/LCS/InitRefr/0708InitRefr.nsf/89fb842d0401c52087256cbe00650696/16f403e0c19126f98725744b0050fd4d/$FILE/Amendment%2048.pdf (last visited Oct. 8, 2012).
72. COLO. CONST., art. II, § 3 (“Inalienable rights. All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.”).
73. COLO. CONST., art. II, § 6 (“Equality of justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.”).
74. COLO. CONST., art. II, § 25 (“Due process of law. No person shall be deprived of life, liberty or property, without due process of law.”).
75. See, e.g., Berlinerblau, supra note 1; Gallagher, supra note 1; New, supra note 1.
Section 33. Person defined. As used in this Article III of the state constitution, "The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof."\(^6\)

Article III of the Mississippi constitution is that state's bill of rights.\(^7\) These narrow amendments seek to redefine the word "person" within the context of that state's constitution. This change would afford the unborn the protections that the constitutions had previously afforded only postnatal human beings to the extent possible under federal law. Additionally, it would announce the position of the state and create a foundation for legislation in the case that \textit{Roe} is overturned some day. Although it would not directly contradict Justice Blackmun's holding in \textit{Roe} (as the definition is limited to specific articles or clauses of the state constitutions), it would create a state whose definition of person would clearly and unequivocally include the unborn. Finally, such an amendment would articulate the state's metaphysical belief in the equivalent personhood of the unborn.

However, such a personhood amendment is also limited. The amendment does not specifically restrict the state legislature from allowing private abortions but relies on the state courts' applications to provide actual protection to the unborn. Although it would extend some rights to the unborn, it would be limited by \textit{Roe}'s right of privacy. The execution of the personhood amendment could be seen as abridging the right to privacy found in \textit{Roe} and the amendment could be overruled under the Constitution's Supremacy Clause. Additionally, while it does articulate somewhat the state's metaphysical position on personhood, it is muddled by the conditioning language which limits the application to the state's constitution. Finally, it works within the framework of the current state constitution which could cause conflict between an overbroad personhood amendment and rights which should be reserved to postnatal human beings (for example, congressional apportionment).


\(^{77}\) MISS. CONST. art. 3.
B. PERSONHOOD STATUTES DEFINING “HUMAN BEING”

*Webster v. Reproductive Health Services* looked at the preamble to a Missouri statute, which provides:

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. Effective January 1, 1988, 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.
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.\(^{78}\)

In *Webster*, the Supreme Court chose not to address the constitutionality of the Missouri preamble because it was only an

abstract proposition and had not concretely restricted the parties involved.\(^79\)

Rita Dunaway has adopted similar language as her suggested language for a personhood amendment.\(^80\) She argues that the fact that the Supreme Court did not strike this language down when it had the chance in \textit{Webster v. Reproductive Health Services} and the fact that it has survived twenty years past that decision demonstrate that the language would survive a legal challenge.\(^81\)

South Dakota also passed a variant of a personhood statute.\(^82\) In particular, the statute defined a human being as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."\(^83\) The Eighth Circuit upheld this definition in \textit{Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds} because it was scientifically and factually true.\(^84\) However, the Eighth Circuit explicitly refused to address the metaphysical question of when a human life begins and stated that the statute did not address that point.\(^85\)

While these definitions carry some limited metaphysical weight, both the Supreme Court in \textit{Webster} and the Eighth Circuit in \textit{Rounds} did not find that the statutes packed much of a legal punch. In \textit{Webster}, the Court refused to address the constitutionality of the preamble because it did not concretely restrict the parties.\(^86\) The South Dakota statute only required the physician to make a statement that an abortion would end the life of an individual human being.\(^87\) Thus, it is similar to other statutes which require certain disclosures and does not unduly burden the woman in deciding to abort. Clearly, these statutes do not secure the rights of the unborn, create a direct contradiction of \textit{Roe}, or establish a foundation for regulating abortion post-Roe.

\(\text{\textsuperscript{79}}\) \textit{Id.} at 506–07.
\(\text{\textsuperscript{80}}\) Dunaway, \textit{supra} note 3, at 344.
\(\text{\textsuperscript{81}}\) \textit{Id.} at 343–44.
\(\text{\textsuperscript{83}}\) \textit{Id.} at § 34-23A-1(4).
\(\text{\textsuperscript{84}}\) \textit{Planned Parenthood Minn., N. D., S. D. v. Rounds}, 530 F.3d 724, 736–37 (8th Cir. 2006) (en banc), \textit{aff'd} Planned Parenthood v. Rounds, 653 F.3d 662 (8th Cir. 2011).
\(\text{\textsuperscript{85}}\) \textit{Rounds}, 530 F.3d at 736.
\(\text{\textsuperscript{86}}\) \textit{Webster}, 492 U.S. at 506–07.
\(\text{\textsuperscript{87}}\) S.D. Codified Laws § 34-23A-10.1(1)(b) (2005).
C. LEGALISTIC PERSONHOOD AMENDMENT

Paul Linton advocates an alternate, more legalistic formulation of the personhood amendment:

Section 1. The policy of the State of [insert name of state] is to protect the life of every unborn child from conception until birth, to the extent permitted by the federal constitution.
Section 2. Nothing in this constitution shall be construed to grant or secure any right relating to abortion or the funding thereof.
Section 3. No public funds shall be used to pay for any abortion, except to save the life of the mother.88

Linton argues that this language would achieve three things: (1) it would make clear the state’s policy of protecting unborn human life to the extent permitted by the United States Constitution, (2) it would overrule and prevent any interpretations of the state constitution as providing a right to abortion, and (3) it would prohibit state funding of abortion except to save the life of the mother.89 He also offers some alternate language to avoid confusion over the definition of conception and Supremacy Clause challenges under the Hyde amendment.90

While Linton’s statute would offer some protection to the unborn and would establish a foundation for regulation if Roe is overturned, it does not make the strong metaphysical statement about the state’s belief concerning the life of the unborn that the other amendments made. This statute, with its missing element, would certainly not contradict Roe, but it would also fail to add to a potential factual challenge of Roe and fail to make a significant metaphysical statement on the nature of life.

88. Fool’s Errand, supra note 7, at 67.
89. Fool’s Errand, supra note 7, at 67.
90. Id. at 68 (to avoid a challenge on the definition of conception, Linton suggests redrafting § 1 to read: “The policy of the State of [insert name of state] is to protect the life of every unborn child at every stage of gestation in utero [or ‘at every stage of pregnancy’] from fertilization until birth, to the extent permitted by the federal constitution.” To avoid a challenge from the Hyde amendment he suggests adding “or as otherwise required by the federal constitution” to the end of § 3.).
D. FEDERAL PERSONHOOD AMENDMENT

The American Life League has accepted language developed by Judie Brown for implementation as an amendment to the United States Constitution:

Purpose: To establish that legal personhood is granted to all human beings in the United States, from the beginning of their biological development.

Section 1:
The right to life is the paramount and most fundamental right of a person.

Section 2:
With respect to the right to life guaranteed to persons by the fifth and 14th articles of amendment to the Constitution, the word "person" applies to all human beings; irrespective of age, health, function, physical or mental dependency or method of reproduction, from the beginning of their biological development.

Section 3:
Congress and the several States, including territories under United States control, shall have concurrent power to enforce this article by appropriate legislation.

Section 4:
Definitions
Human being: Any organism, including the single-cell human embryo, irrespective of the method of reproduction, who possesses a genome specific for and consistent with an individual member of the human species.

Human genome: The total amount of nuclear and extra-nuclear DNA genetic material that constitutes an organism as an individual member of the human species—including the single-cell human embryo.
Human embryo: The term is used to define all human beings from the beginning of the embryonic period of their biological development through eight weeks; irrespective of age, health, function, physical or mental dependency or method of reproduction; whether in vivo or in vitro.

Human fetus: The term is used to define all human beings from the beginning of the fetal period of their biological development (the beginning of nine weeks) through birth; irrespective of age, health, function, physical or mental dependency or method of reproduction; whether in vivo or in vitro.

Personhood: The legal recognition of a human being's full status as a human person that applies to all human beings; irrespective of age, health, function, physical or mental dependency or method of reproduction; from the beginning of their biological development.91

The language in this sample amendment is strong as it provides a metaphysical definition of personhood which includes the unborn. Additionally, it would directly contradict and overrule Roe if enacted in the United States Constitution. It would secure the Fifth and Fourteenth Amendment rights for the unborn and would establish a national regulation of abortion. However, the above language is unlikely to pass nationally and would fail on a state level. The process for amending the United States Constitution is difficult and unlikely for such a sensitive issue. If passed on the state level, a federal court would hold that the above language was clearly unconstitutional under Roe.92

IV. THE AUTHOR'S MODEL PERSONHOOD AMENDMENT

I would blend the legalistic approach sponsored by Paul Linton with the more philosophic nature of the other amendments:

92. See Fool's Errand, supra note 7, at 67.
The purpose of this amendment is to recognize the unique, individual human person who exists at every stage of pregnancy and their inherent right to life.

Section 1: The right to life is the paramount and most fundamental right of a person.

Section 2: Every person, regardless of age, health, physical or mental dependency or method of reproduction, from the beginning of their biological development, is entitled to state protection of their right to life.

Section 3: The term “person,” as found in this amendment, applies to all human beings regardless of their level of biological development.

Section 4: Nothing in this constitution shall be construed to grant or secure any right relating to abortion or the funding thereof.

Section 5: This amendment shall be read to give the fullest protection to unborn human beings permitted by the United States Constitution.

Section 6: If any provision in this amendment is or becomes unenforceable, that shall not affect the enforceability of the remainder of this amendment.

First, this amendment would establish what many already believe: the right to life is necessary and transcends every other natural right. Second, it secures that right for every person, including the unborn, to the extent allowed by the United States Constitution and its interpretation. Thus, the amendment would not be unconstitutional under Roe, but could present a factual challenge to that case. Further, if Roe were overturned, the amendment would scale up its protection of the unborn to the extent allowed under the Constitution. Finally, such an amendment would clearly articulate the state’s metaphysical belief that life and personhood begin at the earliest stages of biological development.
While the amendment above would be an effective tool for securing the rights of the unborn, there are some issues that arise from such an amendment. First, the amendment specifically speaks of a right to life but not other rights, some of which are currently recognized, such as the right to sue in tort and the right to property. This iteration of a personhood amendment does not specifically address other rights because the right to life is the most basic and fundamental of rights and is the right that is currently being denied to the unborn. Although the other rights are important, they have been and can be provided as states see fit. As states begin to recognize a right to life, other rights can and will likely follow. Additionally, the language of the amendment could be changed to include the other rights.

Second, the amendment would call into question the definition of “beginning of their biological development” and whether or not certain contraception devices should be permissible. Although the amendment was not intended to ban certain birth control devices or in vitro fertilization, states can often decide those issues themselves and adopt slightly variant language if they choose not to ban such activities. For example, substituting “beginning of their biological development” with “implantation” or “conception” would provide different starting points for the amendment.

Third, such an amendment could also be read to mandate state-provided health care as it calls for “state protection of [every person’s] right to life.” Again, this was not the intent of the amendment and could be corrected by rephrasing the language. For example, section 2 could be reworded to say “every person, regardless of age, health, physical or mental dependence, or method of reproduction is entitled to state protection against public or private invasions of their right to life” or “no person shall deprive another person of life, regardless of either person’s age, health, physical or mental dependency, or method of reproduction.” Such a change would limit the protection to actions taken against persons instead of other health causes.

Finally, the amendment could call into question the autonomy of pregnant women and a requirement of state monitoring. Again, this was not the intent of the amendment and such an interpretation could be avoided by a change in wording. As with the above issue, changing the wording to avoid affirmative action against the unborn solves the problem of supervising for maternal neglect.
V. OTHER CONSIDERATIONS

Although the focus of this paper was to provide model personhood language which adequately addresses the goals and concerns associated with a personhood amendment, there are other things that should be addressed.

A. A STATE PERSONHOOD AMENDMENT IS THE APPROPRIATE FORUM FOR DECIDING THE ABORTION ISSUE

1. Although the Right to Life is a Natural, Inherent Right, Abortion is Rightly Governed by the State

In Roe v. Wade, the Supreme Court took regulation of abortion out of the power of the state and protected the practice under a Constitutional right.93 Because rights to life and privacy are fundamental, natural rights, it could be seen as proper to remove them from the power of regulation by the states and protect them within the United States Constitution. However, there are significant reasons for placing such a sensitive and contentious issue under the domain of the state.94

a. State police powers

States have the right and duty to protect and defend life under the state police powers. Such a right and responsibility should also come with the ability to decide what life the state must protect. First, states must take into account things such as state resources when deciding the scope and protection possible. Second, each state has a

94. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) (arguing that because the Constitution does not address abortion and historically some states proscribed it, the issue is properly left to the states); Clarke D. Forsythe & Stephen B. Presser, Restoring Self-Government on Abortion: A Federalism Amendment, 10 Tex. Rev. L. & Pol. 301, 320–30 (2006) (arguing for a federalism amendment to the Constitution to overturn Roe and the surrounding jurisprudence and return the issue of abortion to the states); Bruce Walker, State Legislatures Take Up Abortion Issues, The New American (June 7, 2010), http://www.thenewamerican.com/index.php/usnews/constitution/3714-state-legislatures-take-up-abortion-issues (arguing that state regulation has, historically, been measured and reasonable and thus would be equally well reasoned if abortion were returned to the states).
unique constituency that expects a different level of protection and invasiveness from the state. This makes the state the best decider on the level of protection to provide. By removing these choices from the state, the Supreme Court imposed on states a mandatory hands-off approach to protecting the unborn, regardless of the beliefs and resources available to each state. Thus, the state is an appropriate place to decide abortion law.

b. Subsidiarity

When given the choice between deciding things at the local or national level, the local decision is generally more in tune with its population and the needs of that population. By choosing to decide the abortion issue at the highest level—as a Constitutional issue—the Supreme Court neglects the better decision-making power of the local government. Because abortion is such a sensitive and controversial issue, it is better to decide it at the lowest level possible, rather than having a broad, sweeping decision from the highest law in the land.

c. States are more likely to have common metaphysical beliefs

States and communities are more likely composed of groups who share a common metaphysical system of belief than the nation as a whole. By deciding such a sensitive issue through Constitutional interpretation, the Supreme Court neglected the interests of individuals interested in living under a system of laws consistent with their beliefs.

d. Provides diversity among the states

Allowing states the ability to decide how to handle abortion would allow some states to proscribe and others to allow. In turn, this would create diversity among the states, which would both encourage debate and allow conscientious objectors on either side to voice their opinion by moving. Some have argued the potential for diversity is itself proof that the issue should remain with the federal
government.\textsuperscript{95} This argument fails with \textit{Roe} as it presumes a privacy right to abortion. It imposes a permissive, immoral standard on the country simply because it is “easier” than having differences among the states.

2. \textit{A State Constitutional Amendment is Preferable to a State Statute}

\textit{a. State Statutes are Poor Protectors of Rights}

A natural right is more properly placed in a constitutional amendment than a statute. Simply from an organizational perspective, people look to constitutions for an enumeration of their rights before looking to statutes. The placement also says something about the permanence of the right. Although a statute could protect a citizen’s right, it is not binding on future legislation. While laws secure rights, they secure those rights only at the discretion of the standing legislature. Subsequent decisions by the legislature can ignore, modify, or reverse previous legislation. Further, the ease of undoing statutes could create uncertainty and confusion in the status of the law and the community’s concept of right and wrong. Contrarily, an amendment to the constitution would secure certain rights and require enforcement and protection of those rights by the courts. Finally, a state constitutional amendment generally requires some input from the public beyond electing legislators. For an issue as sensitive as abortion, it is more properly decided by the people than by a group elected from those people.

\textit{b. Abortion is an Issue Properly Decided by Direct Democracy}

Direct democracy allows individuals to vote on issues directly through initiatives or referendums instead of by electing representatives.\textsuperscript{96} The state personhood amendments require the use of direct democracy to pass state constitutional amendments that define “person” based on a majoritarian vote.\textsuperscript{97} Molly Carter, a recent graduate of Boston University School of Law, argues that regulations

\textsuperscript{95} See, e.g., LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 125–28 (W. W. Norton ed., 1990) (arguing that this would allow invasive state restrictions on mothers, including prohibiting mothers from crossing state lines to procure an abortion).

\textsuperscript{96} Carter, \textit{supra} note 7, at 308.

\textsuperscript{97} Id.
concerning the abortion issue in general are an inappropriate use of direct democracy.  

Direct democracy carries some advantages and some disadvantages any time it is used. A public vote is an easy way to test the public’s opinion on a topic. Additionally, direct democracy can diminish the impact that special interest groups have in regulating issues and create greater participation and legitimacy in the decisions made. However, direct democracy also allows the majority to control the minority, regardless of the truth and benefit of the minority’s position. The diminished impact of special interest groups is not always clear, as demonstrated by the controversy surrounding the recent passing of California’s Proposition 8. Direct democracy also risks a lack of education in those participating and, relatedly, a lack of careful consideration about what an individual’s vote will mean. This lack of knowledge and careful deliberation about the effect that a law will have could mean dangerous or misdirected regulations that would have been corrected if they had been debated by a legislature and subject to an executive’s veto.

Carter is convincing in her concern for the proper use of direct democracy. There is reason to be concerned that unvetted amendments voted on by the general public could lack the foresight that a bill debated by the legislature would have. However, referendums already require legislative approval to be presented on a ballot. Initiative amendments to state constitutions, although draftable by any citizen and placed on the ballot following a successful petition, would likely be vetted or written by lawyers, politicians, or the legal community. If they were not vetted and were found to violate an individual’s rights or generally lead to negative, unintended consequences, recourse would be available for the injured persons in the courts.

Further, this dim view of direct democracy bespeaks a paternalistic view of government as protecting the misguided masses.

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98. Personhood amendments are not the only abortion questions which have been addressed by direct democracy. See id. at 312–15 (presenting examples such as state funding, parental consent, criminalization of abortion, etc.).
99. Id. at 315.
100. Id. at 316–17.
101. Id. at 317–18.
102. See Jesse McKinley & Kirk Johnson, Mormons Tipped Scale in Ban on Gay Marriage, N.Y. TIMES, Nov. 15, 2008, at A1 (arguing that Mormon’s significant contributions to passing the measure were significant in the final vote). See also Carter, supra note 7, at 318–19.
from their wrongheaded mob mentality. While mob mentality can be injurious to the minority party, it is not necessarily so. The assumption that the average citizen would be willing to impinge the constitutional rights of another that this country is founded on requires defense in a day when everyone is keenly aware of his or her own rights.

Finally, abortion is a polarizing issue. Each side of the debate believes that they are defending a core, natural right. While leaving the issue to the legislature can diminish the ferocity of the discussion, the decision regarding such important, fundamental rights should not be left to the legislature for a vote that will be influenced by electability factors. Citizens are more than capable of weighing the potential rights and coming to a conclusion. Few citizens have not formed an opinion on abortion. These opinions are not arbitrary but are based on the citizens’ fundamental beliefs about the meaning of life and the importance of freedom. For such a morally significant issue, it is right and proper for individuals to have direct influence on the outcome.

B. PERSONHOOD AMENDMENTS COULD CHANGE THE CULTURE’S METAPHYSICAL UNDERSTANDING OF PERSONHOOD

This article has discussed at length the metaphysical import of the different sample amendments. The nature of human life is important in the abortion debate and in other decisions that the government must make regarding life. The reason for this focus is that I believe the fight is won or lost at the individual’s philosophic beliefs. Today, America’s adherence to subjectivism and moral relativism doom the pro-life community to fighting an uphill battle. This is largely due to America’s embrace of existentialism as reflected in its culture, its legislation, and its jurisprudence.

America’s philosophical paradigm is largely existential.104 As the nation of the “American Dream,” freedom, and autonomy, America was a natural ground for the philosophical theory.105 However, this reliance on existentialist thinking has caused a rejection of objective reality in favor of a subjectively defined reality and an emphasis on individual autonomy and freedom of choice.106

104. GEORGE COTKIN, EXISTENTIAL AMERICA (2002).
105. Id.
106. See Rebecca Rabkin, FROM KIERKEGAARD TO KENNEDY: EXISTENTIALIST PHILOSOPHY IN THE...
This subjective view of the world and metaphysical truth is keenly felt by the pro-life movement. The issue of objective truth versus subjective truth is particularly important on issues regarding life. *Roe v. Wade* balanced the constitutional interests of the pregnant woman against the constitutional interests of the unborn. However, the Court explicitly refused to reach the question of when life begins. Instead of embracing the question as a search for an objective truth, the Court entertained a subjective, legal fiction in finding, “the unborn have never been recognized in the law as persons in the whole sense.”

This subjective view of life and personhood was reaffirmed in *Planned Parenthood v. Casey* when the definition of life was relegated to an “intimate and personal choice”: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” This passage rejects the idea of a “Truth” about life and relegates the metaphysical question to a personal preference.

Ronald Dworkin supports this subjective view regarding the truth about when...
In particular, he states that we do better to avoid the questions about fetal personhood and when human life begins and focus instead on the legal questions: "[W]hether states can justify anti-abortion legislation on one of the two grounds—derivative or detached—that I described."

The counterpart to the subjective view of life is the reaffirmation of the value of individual autonomy and choice. In both Roe v. Wade and Planned Parenthood v. Casey, the essential tug-of-war was between the autonomy and freedom of choice of the pregnant woman and the objective human life of the unborn. In both cases, the autonomy of the pregnant woman won out as they rejected an objective view of human life.

There has been a push for greater subjectivity in discussing issues of life. In Washington v. Glucksberg, Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson submitted an amicus brief commonly called the "Philosopher's Brief." The Philosopher's Brief argued that, based on the precedent in Planned Parenthood v. Casey, there exists a constitutionally-protected interest in hastening one's own death. Rebecca Rabkin also argued that by embracing the existentialist view discussed in Planned Parenthood v. Casey, the Court should embrace the same view and extend the liberty right to the right to die and the

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114. Id. Dworkin defines derivative responsibility as the responsibility of the government to protect the rights and interests of its citizens. Id. at 396. Dworkin defines detached responsibility as a responsibility that government owes, external to its citizens, to protect human life as an "objective or intrinsic good, a value in itself." Id. See also RONALD DWORIN, LIFE'S DOMINION 13 (1994).
115. Casey, 505 U.S. at 851.
116. Id. at 833; Roe, 410 U.S. at 113.
117. Note that some have been resistant to extending the existential view of human life. See, e.g., Scaperlanda, supra note 107, at 638. Some have also questioned the use of philosophy at all when making judicial decisions. See, e.g., Neomi Rao, A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court, 65 U. CHI. L. REV. 1371 (1998) (arguing that philosophy does not have a proper role in judicial decision-making). Some have endorsed the use of philosophy without dictating the philosophy to be used. See, e.g., Thom Brooks, Does Philosophy Deserve a Place at the Supreme Court?, 27 RUTGERS L. REC. 1 (2003) (criticizing Rao's argument that philosophy should be distinct and never used in the Supreme Court).
119. Id.
right to sexual intimacy.\textsuperscript{120} This emphasis on embracing the existential view demonstrates the importance of the pro-life movement asserting its own philosophical paradigm.

Many legal scholars have argued that just as culture can impact the laws of a region, the laws of a region are a part of/impact the culture of that region.\textsuperscript{121} For example, tougher regulations on smoking and limitations on where smoking is permitted have at least some part in the change from smoking as an acceptable behavior to an aberrant behavior.\textsuperscript{122}

In the same way, passing a state personhood amendment that defines an unborn child as a person can impact the culture of that state. First, the personhood amendments have already and will continue to receive publicity from local and national media.\textsuperscript{123} Second, because of the media coverage, people will be encouraged to discuss the issue with their friends, coworkers, and family, thereby passing on the message and provoking thought on one’s own metaphysical beliefs. Third, having the measure on the ballot will require voters to confront the issue and weigh their own beliefs about life, death, and personhood. If the measure is passed, it will become part of the state constitution, the highest governing document of the state. The amendment would be afforded special deference because of its place in the state constitution. Finally, any legal challenges to the amendment would give greater publicity to the amendment and encourage further thought.

\begin{itemize}
\item\textsuperscript{120} Rabkin, \textit{supra} note 106, at 629–34.
\item\textsuperscript{122} Howard K. Koh, Luk X. Joossens, & Gregory N. Connolly, \textit{Making Smoking History Worldwide}, 356 NEW ENG. J. MED. 1496, 1497 (2007).
\end{itemize}
C. FUTURE CONSIDERATIONS FOR THE PROLIFE MOVEMENT

1. Personhood Amendments Do Not Completely Address the Entirety of the Rights that Belong to the Unborn

If the state personhood amendments somehow succeeded in redefining “person” in the federal government, the definition would need to be reviewed and reworked to provide the rights appropriate to the unborn. \textsuperscript{124} David Westfall argues persuasively that considering the unborn a “person” will require significant review of the potential and appropriate rights and responsibilities. \textsuperscript{125} Westfall provides three potential approaches: (1) the rights of the unborn could be limited to protection from abortion, (2) the rights of the unborn could be protection from bodily injury but no protection from injury to property rights or other interest, and (3) the rights of the unborn could be as expansive as any other person’s rights. \textsuperscript{126}

If the rights of the unborn are limited to protection from abortion, the term “person” is merely a façade for an attack on \textit{Roe v. Wade}. \textsuperscript{127} Additionally, under this definition of personhood, one could argue that the unborn would be deprived of civil rights natural to other persons and thus to themselves. Defining the unborn as a “person” merely for the purpose of granting them protection from abortion accepts the notion that we can pick and choose the rights appropriate to individuals despite the clear language in the Constitution that such rights should be afforded to every person. It creates a dichotomy whereby we treat pre-born persons differently, despite defining them the same way.

If the unborn have a right to be protected from bodily injury but no right to be protected from injury to their property right or other interest, we are again bifurcating “persons” into two subsets. This bifurcation can easily become a trifurcation, \textit{ad nauseum}, in creating a hierarchy of persons with those at the top holding the greatest number of rights. Westfall argues primarily on this point that the rights of an unborn child to life could collide with the same or different rights of the mother. \textsuperscript{128} If the unborn have a right to life and

\begin{enumerate}
\item See Judith M. Nyhus Johnson, \textit{Minnesota’s “Crack Baby” Law: Weapon of War or Link in a Chain?}, \textit{8 LAW & INEQ.} 485, 515–17 (1990); Westfall, \textit{supra} note 7, at 103.
\item Westfall, \textit{supra} note 7, at 103.
\item \textit{Id.}
\item \textit{Id.} at 103–04.
\item \textit{Id.} at 104.
\end{enumerate}
freedom from bodily harm, the federal government would need to weigh the rights of the mother against that fundamental right of the unborn and decide, on a case-by-case basis, whose rights supersede the other's.\textsuperscript{129}

Finally, if an unborn child were granted all of the rights under the Constitution that another person were afforded, the results would be absurd.\textsuperscript{130} Granting the unborn the fullness of rights granted to others would affect legislative apportionment,\textsuperscript{131} distribution of governmental fiscal benefits,\textsuperscript{132} civil liberties,\textsuperscript{133} the federal income tax,\textsuperscript{134} criminal law,\textsuperscript{135} torts,\textsuperscript{136} health care and medical malpractice,\textsuperscript{137} laboratory research and in-vitro fertilization,\textsuperscript{138} gender-based employment discrimination,\textsuperscript{139} and others.

Judith Nyhus Johnson reviewed the rights being granted to unborn children in 1990 and found that the law had embraced tort claims both against third parties and against the mother.\textsuperscript{140} She also repeated the warning that accepting these unborn "person" rights could lead to significant violations of the rights of the mother, especially as technological advances impose greater duties on the mother to ensure the proper development of her unborn child.\textsuperscript{141} Others have struggled with the criminal liability of third parties imposed because of a recognition of the unborn’s "personhood" rights.\textsuperscript{142} Still others have explained these increasing unborn rights as legal fictions to protect state interests, not the unborn’s interest.\textsuperscript{143}

Regardless of the many arguments concerning the rights surrounding fetal personhood, the recent history has demonstrated

\begin{itemize}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{See, e.g., id. at 104–07.}
\item \textsuperscript{131} Westfall, supra note 7 at 107–10.
\item \textsuperscript{132} \textit{Id.} at 110.
\item \textsuperscript{133} \textit{Id.} at 110–11.
\item \textsuperscript{134} \textit{Id.} at 111–13.
\item \textsuperscript{135} \textit{Id.} at 113–15.
\item \textsuperscript{136} \textit{Id.} at 115–16.
\item \textsuperscript{137} Westfall, supra note 7 at 116–20.
\item \textsuperscript{138} \textit{Id.} at 120.
\item \textsuperscript{139} \textit{Id.} at 120–28.
\item \textsuperscript{140} Johnson, supra note 124, at 511–15.
\item \textsuperscript{141} \textit{Id.} at 517–25; see also Cynthia R. Daniels, At Women’s Expense: State Power and the Politics of Fetal Rights (1993); Rachel Roth, Making Women Pay: The Hidden Costs of Fetal Rights (2000).
\item \textsuperscript{142} \textit{See, e.g., Walen, supra note 7, at 163 (arguing that state laws punishing the harming of unborn children pose a direct threat to Roe).}
\item \textsuperscript{143} \textit{See, e.g., Juliana Vines Crist, The Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws, 60 Case W. Res. L. Rev. 851, 867–69 (2010) (arguing that state fetocide laws do not pose a threat to federal abortion jurisprudence).}
\end{itemize}
that the government can and will address the issue rationally. Although many states have passed feticide laws or allowed tort cases against third parties, no state has struggled with whether or not it is required to allow the unborn a vote or proper legislative apportionment. While defining the unborn as persons would be a significant step in the law and would require significant litigation and legislation to govern the rights warranted by personhood of the unborn, there is no indication that states would shut down from an inability to census the unborn. Thus, this argument, while an important thought experiment on the work yet to be done, does not present a significant hindrance to unborn personhood.

2. Overruling Roe v. Wade Could Leave a Nationwide Gap in Abortion Regulation

Prior to Roe v. Wade, states had laws on the books regulating abortion. However, following Roe v. Wade, many of those laws were either repealed or made ineffective by the decision in Roe that the state did not have an interest in the first trimester of pregnancy, an interest in the woman’s health alone in the second trimester, and an interest in the potentiality of life tempered by the mother’s health in the third trimester. Fewer than one-third of states have retained their pre-Roe laws. Most of those states that have retained their laws would not prohibit abortion if Roe v. Wade were overruled. This presents a significant issue for the pro-life movement and calls into question the efficacy of overruling Roe v. Wade, if possible, through a state constitutional amendment. In particular, what happens to the forty-nine other states if one state’s constitutional amendment is successful in overruling Roe v. Wade?

Richard Fallon argues that overruling Roe v. Wade may not be as “neat and simple” as many believe it would be. He argues, first, that because of the cultural significance and divisiveness of abortion, the Supreme Court would not be able to remain neutral on the issue. For example, if one state chose to outlaw citizens crossing

144. Paul Benjamin Linton, The Legal Status of Abortion in the States if Roe v. Wade is Overruled, 23 ISSUES L. & MED. 3, 4 (2007) (analyzing on a state-by-state basis the current state laws regarding abortion and discussing the nationwide regulation if Roe was overruled).
145. Id.
147. Id. at 652–53.
state lines to procure abortions, they would need the help of the federal government to secure that regulation. Because the Supreme Court would need to weigh in on these issues at some level, the issue will never fully return to the states and will likely be subject to federal jurisdiction.148 Second, Fallon argues that returning abortion regulation to the states would create significant issues involving state and national citizenship.149 Again, the Supreme Court would need to weigh in on issues such as regulating out-of-state abortion, free speech in advertising abortion, and the difference between state and national citizenship.150

First, based on the legal challenges to the personhood amendments, it seems unlikely that they will themselves overrule Roe v. Wade or even create a test case which could prompt the Supreme Court to overrule the case. However, if the amendments were successful, it would emphasize the importance of enacting the personhood amendments in every state to fill that regulatory gap. The status quo is unacceptable to most if not all of the pro-life movement. Currently, abortion is available nearly on demand. Although the Supreme Court has walked back the availability of abortion and has not required the state or federal government to fund it, abortion is too prevalent for the pro-life movement to stop acting.151 Although some unintended consequences may result from a push to overturn Roe v. Wade, it remains a worthwhile endeavor.

3. The Efficacy of Attempting to Pass Personhood Amendments

The recent defeat of the Mississippi Personhood Amendment gives greater support to Paul Linton’s argument that the personhood amendment path is injurious to the pro-life movement.152 Each defeat does carry a toll. Additionally, some have noted that the personhood amendments are creating a schism within the pro-life movement between those who oppose this method and those who support it.153

148. Id.
149. Id. at 653.
150. Id.
151. Rachel K. Jones & Kathryn Kooistra, Abortion Incidence and Access to Services in the United States, PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 41, 43 (2011) (citing the percent of pregnancies, as of 2008, that end in abortion, excluding miscarriages, as 22.4%).
152. Fool’s Errand, supra note 7.
Such division is unacceptable and must be addressed. However, the model amendment that I have offered addresses some of the division (e.g., personhood amendments banning certain birth control) and the urgency of the pro-life cause still supports action.

VI. CONCLUSION

There are many reasons to delay action on the personhood amendments and to wait for other changes. Some argue that it costs too much to press forward when the amendments will not have the immediate effect of overruling Roe v. Wade. Others worry about the procedure involved or the significant effect that these amendments could have on the laws of the states. Still others worry about the policy implications. The reasons for action outweigh the reasons for delay. Twenty-two percent of pregnancies end in abortion.154 This unspeakable statistic alone demands action. Additionally, the march continues to redefine life for convenience. If the pro-life movement does not stand up for truth today, they will stand alone tomorrow.

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154. Jones & Kooistra, supra note 151, at 43.