LIBERTY UNIVERSITY

Liberty University Law Review

Volume 6 | Issue 2 Article 4

December 2012

An Apologia for Personhood

Stephen M. Crampton

ARTICLE

AN APOLOGIA FOR PERSONHOOD

Stephen M. Crampton†

The care and protection of the most vulnerable among us is perhaps the truest test of a civilized society. America prides itself on its lavish provision of humanitarian aid in times of disaster all across the globe. We have enacted extensive legal protection for animals. We laud those who protest on behalf of the rain forests and environment.

When it comes to the unborn, however, we not only fail to protect them, we celebrate their destruction as a constitutional right. This is plainly wrong. The Personhood Movement seeks to remedy this injustice and to protect the unborn. It is the only pro-life strategy that offers a direct and immediate challenge to the tyranny of *Roe v. Wade*.[1]

The logic of Personhood is simple. Science and medicine have long recognized that the offspring of humans is both fully human and fully alive from his earliest beginnings. Personhood posits that he is entitled to be recognized as a "person" under the law as well. This simple proposition is principled and broad in its reach. It does not limit itself to the narrow field of abortion, but applies more generally to all endeavors that infringe the rights of the unborn. In short, Personhood offers the only solution if we are truly concerned about extending equal protection under the law to all classes of persons.[2]

Denial of the personhood of the unborn is also a denial of scientific and medical reality. Consider just a few well-established facts. "The

---

† Steve Crampton serves as Vice President for Legal Affairs and General Counsel for Liberty Counsel, an international nonprofit litigation, education, and policy organization dedicated to advancing religious freedom, the sanctity of life, and the family since 1989, by providing pro bono assistance and representation on these and related topics. Mr. Crampton practices exclusively in the area of constitutional rights. He has served as lead counsel in numerous reported decisions in state and federal district and appellate courts. Mr. Crampton was the primary author of the Mississippi Personhood Amendment and currently represents various Personhood groups around the country. He received his law degree from the University of New Mexico, where he was a member of the Law Review, and his B.A. from St. John's College. The author would like to thank the entire Editorial Board of Liberty Universtiy Law Review for their excellent work on this article, with special thanks to Managing Editor Daniel Schmid.

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

2. *See* U.S. CONST. amend. XIV (providing that states cannot "deny to any person within its jurisdiction the equal protection of the laws").

development of a human being begins with fertilization."[3] Additionally, "[a]t the moment the sperm cell of the human male meets the ovum of the female and the union results in a fertilized ovum (zygote), a new life has begun."[4]

Moreover, from the moment that the new life is formed, he has all the genetic information necessary to his development. Genetically, he is complete from the beginning.[5] All he needs to grow and become a fully developed human is what each fully developed human needs: nourishment, protection, and a warm environment.

Given these non-controversial facts, one might wonder why there is any argument over the Personhood of the unborn. Those who seek to exploit the unborn for personal profit, however, are tireless in their efforts to confound and confuse the issue. To this day, counselors in abortion clinics persist in telling naïve women that it is not a baby they are carrying but a "blob of tissue."

More recently, those involved in the in vitro fertilization and cloning industries have devised new terminology to deny the humanity and Personhood of unborn children. Rather than refer to unborn children as "embryos," these wordsmiths have dubbed them "*pre*-embryos."[6] Their

---

3. JAN LANGMAN, MEDICAL EMBRYOLOGY 3 (3d ed. 1975).

4. VAN NOSTRAND'S, SCIENTIFIC ENCYCLOPEDIA 943 (Douglas Considine ed., 5th ed. 1976); *see also*, MOSBY'S MEDICAL DICTIONARY (7th ed. 2006) (defining "embryo" as "the young from the moment of fertilization until it has become structurally complete and able to survive as a separate organism"); REPORT, SUBCOMMITTEE ON SEPARATION OF POWERS TO SENATE JUDICIARY COMMITTEE S-158, 97th Congress, 1st Session (1981) (testimony of Dr. Jerome LeJeune, "the father of modern genetics," professor of genetics at the University of Descartes in Paris and the discoverer of the chromosome pattern of Down syndrome: "After fertilization has taken place a new human being has come into being. [It] is no longer a matter of taste or opinion . . . it is plain experimental evidence. Each individual has a very neat beginning, at conception."). The official Senate Report concluded: "Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being—a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings." *Id.* at 7.

5. *E.g.*, Hymie Gordon, *Genetical, Social and Medical Aspects of Abortion*, South African Med. J., 721-30 (July 20, 1968); RONAN O'RAHILLY & FABIOLA MÜLLER, HUMAN EMBRYOLOGY & TERATOLOGY 8, 29 (2d ed. 1996).

6. *E.g.*, Jonathan Will, *The Commitment to Pre-Embryonic Personhood*, MISS. BUS. J. (Sept. 23, 2011), *available at* http://msbusiness.com/2011/09/op-ed-life-and-law-%E2%80%94%C2%A0the-commitment-to-pre-embryonic-personhood/. For a detailed exposé of the manipulation of the terminology and rules governing the experimentation and destruction of the unborn in the name of science, see William Saletan, *The Organ Factory*,

intent, of course, is to imply that destruction of these living beings is morally acceptable because they are pre-*human*. Although the term has been discredited by the Nomenclature Committee of the American Association of Anatomists,[7] its use continues.

It is a sad but undeniable fact that science, law, and almost every field of human endeavor has been corrupted by the ideological, philosophical, and ultimately religious differences that now divide us. We should not be surprised that the law has similarly become the tool of social engineers.

Even worse, the Personhood movement faces intense opposition from many within the pro-life camp, too, thus finding itself in the middle of a vicious cross-fire from both pro-abortion forces and establishment, pro-life forces. This paper is intended to address some of the attacks from those in the pro-life camp.

I. THE AUTHORITY OF THE U.S. SUPREME COURT IS LIMITED.

One of the primary arguments advanced by our detractors is that Personhood efforts are futile because the United States Supreme Court will undoubtedly refuse to overturn *Roe v. Wade*.[8] This argument further posits that if the Supreme Court hears a Personhood case, it may result in *Roe v. Wade* and the so-called "right" to abortion becoming even more firmly entrenched than it is now.[9]

The immediate response to this argument is to ask how much more firmly entrenched can the "right" to abortion become? This question is even

---

SLATE (July 25, 2005, 12:30 PM), http://www.slate.com/articles/health_and_science/human_nature/features/2005/the_organ_factory/cures_now.html.

7. *See* C. Ward Kischer, *When Does Human Life Begin? The Final Answer*, LIFEISSUES.NET (2003), http://www.lifeissues.net/writers/kisc/kisc_04whenlifebegins1.html. In fact, the term was first coined in 1979 by a frog embryologist by the name of Clifford Grobstein in an article for Scientific American. *See id.* Grobstein freely admitted that his purpose was to reduce "the status" of the human embryo. *Id.*

8. Roe v. Wade, 410 U.S. 113 (1973).

9. *See, e.g.*, Memorandum from James Bopp, Jr. & Richard E. Coleson to Whom It May Concern (Aug. 7, 2007) *available at* http://operationrescue.org/pdfs/Bopp%20Memo%20re%20State%20HLA.pdf. [hereinafter "Bopp Memo"]. These same arguments are regurgitated, with slight variations, by other detractors. *See, e.g.*, Paul Linton, *A Fool's Errand: State Personhood Proposals*, HUMAN LIFE REV. (Fall 2009), *available at* http://www.docstoc.com/docs/45008903/A-Fools-Errand-State-Personhood-Proposals. Mr. Linton's emotionally laden diatribes are frequently repeated courtesy of Life News. For an excellent response to the entire Bopp Memo, see Memorandum from Robert J. Muise, Esq., Thomas More Law Center, to All Concerned Pro-Life Supporters (Sept. 24, 2007) *available at* http://personhoodeducation.files.wordpress.com/2009/06/muiseresponse.pdf.

more relevant when one considers that it is currently permissible under the regime of *Roe v. Wade* to kill an unborn child from birth right up until the time that the child has fully emerged from his mother's birth canal. But beyond that practical reality, a broader examination of the question is helpful.

In addition, predicting what the Supreme Court will do in any particular case is far more difficult than predicting the weather. We all know how often the weatherman gets it wrong, even when he employs the most sophisticated meteorological equipment. We cannot even predict who will be on the Court if and when the next case challenging *Roe v. Wade* is considered. In fact, since the Bopp Memo was written, two new Justices have been appointed to the Court.[10]

These pro-life critics have tacitly conceded that the authority of the Supreme Court is unlimited. They assume that the declarations of the High Court are *ipso facto* the final say on the question of the right to life—no matter how absurd or unfounded. And, that these same declarations effectively establish the law for all departments of the federal government as well as for all states, under all circumstances.[11] Therefore, they argue, the pro-life strategy must be focused exclusively on changing the makeup of the Court by helping to elect pro-life Presidents who in turn will appoint pro-life Justices who will, one day in the indeterminate future—perhaps—overrule *Roe v. Wade*.[12]

This position effectively condones the killing of thousands, if not millions, of innocent babies for years to come, which is a situation no principled pro-life advocate should accept. Moreover, this *strategy* works at

---

10. Associate Justice Sonia Sotomayor was nominated May 26, 2009 and sworn in August 8, 2009, and Associate Justice Elena Kagan was nominated May 10, 2010 and sworn in on August 7, 2010. *See Biographies of Current Justices of the Supreme Court*, http://www.supremecourt.gov/about/biographies.aspx.

11. *See* Bopp Memo *supra* note 9, at 2-3.

12. *Id.* at 2-5. Secondarily, they argue, we should devote our efforts to incremental restrictions on the practice of abortion, thereby nibbling away at the massacre of the unborn and "chang[ing] the hearts and minds of the public." *Id.* at 5. Mr. Bopp cites the example of the partial birth abortion ban as one such successful effort. *Id.* The obvious problem with this strategy, of course, is that while we play politics and "incrementally" plod along with restrictive legislation, millions of babies continue to be slaughtered, and we stand idly by. One cannot help but wonder what the Allies would have said at the end of World War II had some Nazi "pro-life" soldiers argued that they were not responsible for the extermination of the Jews because they were "incrementally" working to change Hitler's mind by adopting restrictions on the use of the gas chambers and so saved a few hundred people while millions of others were executed.

cross-purposes to one of the very goals it espouses. For the longer the killing continues, the more desensitized and accepting of the practice the public becomes, and the less likely they will be to finally rise up and stop the slaughter.[13]

The ongoing extermination of the unborn cannot be tolerated, even for a moment, much less for many years.

Happily, our detractors are simply wrong about the authority of the Supreme Court. Their argument may be restated succinctly as, "The state giveth, and the state taketh away." But this is demonstrably false. Our nation's charter, the Declaration of Independence, preceded the Constitution by thirteen years. It set forth the foundations of our national government and the very reasons for its existence.[14] It declared emphatically that our rights come not from man, nor from the state, but from God Himself, our Creator.[15] As such, the rights of man may not be taken away by the state; they are "unalienable."[16] Among these rights, and the first stated in the Declaration of Independence, is the right to life.[17]

The purpose of our government is "to secure these rights," that is, to protect and preserve them, not to "alienate" them. The Supreme Court, in *Roe v. Wade*, violated these fundamental tenets of our founding documents. The critics of Personhood simply accept this usurpation of authority and now defend the usurpers in retaining the authority they seized.

In addition, our Federal Constitution carefully divides the branches of government so as to limit the power of any one branch, and further limits the power of the entire federal government both by specifically delimiting its authority and setting forth an explicit bill of rights. It also recognizes the

---

13. In fact, it is the supporters of Personhood, not the incrementalists, who have powerfully changed the debate on the issue of life, and are thereby dramatically affecting the views of our citizens. Indeed, Personhood U.S.A. has gone so far as to inject the issue of Personhood into the presidential race, recently hosting a debate among the candidates in the Republican primary that was broadcast nationwide. *See* David Crary, *Multistate Personhood Push Kindles Abortion Debate*, THE DENV. POST (Jan. 20, 2012, 2:53 PM), http://www.denverpost.com/nationworld/ci_19784732.

14. THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776) (stating "[t]hat to secure these rights [Life, Liberty, and the pursuit of Happiness], Governments are instituted among men . . . .").

15. *Id.* ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights—that among these are Life, Liberty, and the pursuit of Happiness.").

16. *Id.*

17. *Id.*

separate sovereignty of the states within their sphere. Consequently, it is an affront to our American legal system simply to concede to the Supreme Court—the branch called by Alexander Hamilton in The Federalist No. 78[18] the least powerful branch—the sole and absolute authority to declare when life begins and who has a right to live.[19]

The judiciary was not charged with setting policy and is not the final arbiter of rights.

> The conception of the judicial role that [Chief Justice John Marshall] possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be "the province and duty of the judicial department to say what the law *is*," Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (emphasis added) – not what the law *shall be*. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power "not delegated to pronounce a new law, but to maintain and expound the old one." 1 W. BLACKSTONE, COMMENTARIES 69 (1765).[20]

The opponents of Personhood are wrong to cede such limitless authority to the Supreme Court, and this presupposition skews their entire argument.

---

18. THE FEDERALIST NO. 78 (Alexander Hamilton), *available at* http://www.constitution.org/ fed/federa78.htm (stating "the judiciary is beyond comparison the weakest of the three departments of power").

19. As Judge Adrian Burke wrote in his dissenting opinion in an early (pre-*Roe v. Wade*) abortion case in New York, in which the court acquiesced to the New York legislature's statute allowing abortion on demand during the first six months of a woman's pregnancy:

> To equate the judicial deference to the wiseness of a Legislature in a local zoning case with the case of the destruction of a child in embryo which is conceded to be "human" and "is unquestionably alive" is an acceptance of the thesis that the "State is supreme," and that "live human beings" have no inalienable rights in this country. The most basic of these rights is the right to live, especially in the case of the "unwanted" who are defenseless.

Byrn v. N.Y.C. Health & Hosp. Corp., 31 N.Y.2d 194, 205 (Ct. App. 1972) (Burke, J., dissenting).

20. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring).

II. THE STATES HAVE ALWAYS HAD AUTHORITY TO PROTECT THE UNBORN.

In stark contrast to those in the pro-life community who blindly concede all power over life to the Supreme Court, supporters of Personhood honor our founding principles by appealing to the states to affirm the right to life. After all, if a sovereign state has no authority to declare when life begins and thereby to protect the helpless unborn within its borders, what is left of the original limitations on federal authority under our Constitution?[21]

It is well within the sovereign power of the states to enact laws protecting life.[22] The Supreme Court has long recognized the inherent authority of the states to enact laws in the realm of morality. While the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."[23] Certainly the protection of innocent unborn children falls squarely within this zone.

---

21. Personhood represents far more than a response to the evil of abortion. As one commentator has written:

> Personhood, in fact, teases out the deeper dimension of what it means to be a human being. The standard definition of human being is zoological—it begins with the fact that we are animals endowed with a unique form of reasoning called rationality. But rationality is only the beginning of the story of what it means to be a person our rationality is housed in an immaterial intellect such that it is capable of indefinite expansion, even to beholding the vision of God, our Creator. This rational difference, as it is called, is the seat of our freedom, our will, our desire for eternal happiness, our ability to know the truth, and our love. It is the means by which we, unlike any other animal, make choices that affect our happiness.

Deal W. Hudson, *Personhood and Politics: From the Trinity to the Courtroom*, CATHOLIC ADVOCATE (Jan. 21, 2010), *available at* http://www.catholicadvocate.com/2010/01/a-catholic-case-for-personhood/.

22. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 62 (1873) (recognizing that the States traditionally have had great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons.") (quoting Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 140, 149 (1855)).

23. Holden v. Hardy, 169 U.S. 366, 392 (1897) (quoting Lawton v. Steele, 152 U.S. 133, 136 (1894)); *see also* Barbier v. Connolly, 113 U.S. 27, 31 (1885) ("[N]either the [14th] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people,

This authority of the states was of course recognized by Justice Blackmun in *Roe v. Wade*: "The appellee and certain amici argue that the fetus is a person within the language and meaning of the Fourteenth Amendment.... 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."[24]

The exercise of this authority has increasingly found voice in the enactment of laws in the field of torts and elsewhere that recognize the personhood of the unborn. For example, the Alabama Supreme Court unanimously ruled that under that state's law, "'logic, fairness, and justice' compel the application of the Wrongful Death Act to circumstances where prenatal injuries have caused death to a fetus before the fetus has achieved the ability to live outside the womb."[25]

The reason that "logic, fairness, and justice" require such a result is clear: "'A child is an entity, a 'person,' from the moment of conception.'"[26] And if the child is a "person" for purposes of a wrongful death action, "logic, fairness, and justice" require that he is also a "person" for purposes of due process and the protection of his right to life. To do anything less than extend the full protection of the law to the life of the unborn person would be to violate the equal protection clause.[27]

---

and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.").

24. Roe v. Wade, 410 U.S. 113, 156-57 (1973).

25. Mack v. Carmack, 2011 WL 3963006, *14 (Ala. Sept. 9, 2011). The Alabama Supreme Court also noted that six other jurisdictions (Illinois, Louisiana, Missouri, Oklahoma, South Dakota, and West Virginia) specifically allow wrongful death actions even where the death of the fetus occurs before viability. *Id.* at *12 (citing LA. CIV. CODE ANN. art. 26 (1999); Pino v. United States, 183 P.3d 1001 (Okla. 2008); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995); Farley v. Sartin, 195 W. Va. 671, 466 S.E.2d 522 (1995); Smith v. Mercy Hosp. & Med. Ctr., 203 Ill. App. 3d 465, 148 Ill. Dec. 567, 560 N.E.2d 1164 (1990)).

26. *Id.* at *10 (quoting Gentry v. Gilmore, 613 So.2d 1241, 1249 (Ala. 1993) (Maddox, J., dissenting)) (citing 1 STUART M. SPEISER, ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 4.37, at 204 (3d ed. 1992)).

27. *See* U.S. CONST. amend. XIV (providing that states cannot "deny to any person within its jurisdiction the equal protection of the laws").

III. EVEN IF THE SUPREME COURT IS THE ULTIMATE AUTHORITY, THE TIME IS STILL RIGHT FOR PERSONHOOD.

A Personhood Amendment does nothing more than recognize what science, medicine, and logic have long affirmed, namely that an unborn child is fully human and fully alive from the moment of conception or fertilization.[28] It thus brings the law into conformity with reality.

Furthermore, a Personhood amendment is not a run-of-the-mill attack on abortion. Unlike a statute that simply outlaws abortion, a true Personhood amendment provides umbrella protection for the unborn against not only the abortionist's knife, but also against the reach of those seeking to destroy the child in order to harvest his stem cells for use in cloning, and against the fertility clinic that seeks to destroy an unused but fertilized embryo. Consequently, the case should not be analyzed purely under the narrow line of abortion cases.

It is well known that the rules governing abortion cases are often skewed; the "abortion distortion" factor has even been recognized by proponents of abortion. For instance, Justice Sandra Day O'Connor has written: "This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence."[29] And as one of the most outspoken critics of Personhood has noted, "[n]either the Supreme Court nor any other court appears to have placed any particular reliance on *Roe v. Wade* in deciding any case not involving abortion."[30]

The interest of a state in protecting life outside the confines of abortion can only be described as compelling. This alone increases the chances of prevailing in a legal challenge to a state Personhood amendment. But the states' rights element is also significant, especially in light of the prominence of the Tea Party movement and the anti-Washington sentiment expressed in the most recent Congressional elections.

In short, a Personhood case does not present just another abortion case. Instead, it offers perhaps the best chance in years of persuading the courts to take a fresh look at the right of a state to protect its youngest and most helpless residents. The courts should not automatically rule against a Personhood amendment simply because it impacts the "right" to abortion.

---

28. *See* O'RAHILLY & MÜLLER, *supra* note 5.

29. Thornburgh v. Am. College of Obstets. & Gynecs., 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

30. Paul B. Linton, Planned Parenthood v. Casey: *The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 101 (1993).

Personhood entails a great deal more than abortion and should be analyzed accordingly.

IV. CONCLUSION

The case for Personhood is compelling. Not only does it bring the law into alignment with science and medicine, but it also comports with the very foundations of the American legal system and all that is right and just. Personhood is an idea whose time has come.