

PERSONHOOD: A PATH TO VICTORY

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5. IN CONCLUSION

The Pro Life Movement must have a way of defining victory. We can start by knowing what victory is not. St. Thomas Aquinas wrote that “any law that is contrary to fundamental truth is no law, it is violence.” Our law must be the core of fundamental truth, and that fundamental truth is that:

“All Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.¹”

Personhood laws seek to do just that, to protect all human beings as persons from their biological beginning. This document will lay out the legal and strategic foundations for personhood.

Amazingly, universal human personhood's biggest political opponents are the National Right to Life Committee (NRLC), Americans United for Life (AUL), and the United States Conferences of Catholic Bishops (USCCB). Time and time again, these groups have spread misinformation in order to dissuade grass roots pro-lifers from pursuing a personhood approach.

In Georgia, at the state hearings for the 2007 Georgia Human Life Amendment, attorneys for Planned Parenthood sat next to the attorneys for the Catholic Conference

¹ Catechism of the Catholic Church 2270, from *Donum Vitae* (1987) written by Cardinal Ratzinger, now Pope Benedict XVI.

in order to defeat a personhood or Human Life Amendment that had a unique chance of passing. In fact, it would have passed the very difficult legislative hurdles and was ahead in the public opinion polls, before the Catholic Bishops of Georgia and NRLC scared the legislators away from supporting the personhood law. These groups falsely give people the impression that only through timid incremental legislation can any progress ever be made. This incrementalist myth is as demoralizing as it is false.

This document is, in part, a response to the attempts by these incrementalist groups to stifle personhood efforts. To a greater extent this document is meant to educate and not to argue.

We believe that the timid incrementalist approach that is too afraid to even consider the possibility of protecting all innocent human lives makes abortion negotiable and tends to corrupt our discourse.

Supporters of personhood believe that a direct approach to abortion is the best way to combat it. A direct and honest approach is necessary to a successful pro-life strategy, for as long as *Roe v. Wade* remains the law of the land, we will never have meaningful restrictions on abortion. Incrementalists seek to work within the legal framework created by *Roe v. Wade*, while Personhood seeks to overturn that framework.

The legal reasoning behind personhood legislation and personhood amendments are well reasoned and timely. The following are the legal foundations of the personhood movement:

1. STATES POSSESS THE RIGHTS TO ENACT CONSTITUTIONS WITH RIGHTS THAT ARE MORE EXPANSIVE THAN THOSE THAT ARE CONTAINED IN THE FEDERAL CONSTITUTION

It's a well established principle of law that states possess the rights to enact constitutions with rights that are more expansive than those that are contained in the federal constitution.²

According to the reasoning in *Roe v. Wade*, the federal constitution is silent on the issue of abortion³, stating that there are no prenatal applications to the unborn under the 14th amendment, and furthermore that "if this suggestion of personhood is established, the appellant's case (the case for legalized abortion), of course, collapses, [410 U.S. 113,

² The Supreme Court has asserted in numerous situations "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

³ *Roe v. Wade*, 410 U.S. 113, 158 (1973).

157] for the fetus' right to life would then be guaranteed specifically by the Amendment.”⁴

State personhood amendments attempt to enshrine the rights of the preborn into state laws and constitutions. And although Justice Blackmun spoke of the definition of personhood under the 14th amendment, not state constitutions, having a state constitution which directly contradicts the holding that *Roe v. Wade* would force the Supreme Court to revisit the question of whether the Supreme Court can contradict the will of the states in the exercise of their constitutionally protected police powers

2. CREATING A CASE IN CONTROVERSY

If a state were to extend personhood rights to the preborn there would be a conflict with *Roe v. Wade*, which under the supremacy clause is the supreme law of the land. That conflict is exactly what we are aiming for. A majority of justices: Scalia⁵, Kennedy⁶, Thomas⁷, Roberts⁸, and Alito⁹, are federalists. Federalists believe in expansive police powers through which the states, not the courts, can make local laws to regulate behavior and protect the safety, health, and morals of the people.

By adopting an expansive definition of the word person, which would include protection of the preborn, the states would be issuing a direct challenge to *Roe v. Wade*, which interpreted the 14th amendment to say that the right to privacy included a right to abortion which the states could not infringe upon. In deciding the case, the Court might very well find that the right to an abortion is nowhere to be found in the 14th amendment and that the states may regulate it as they wish. Another possibility, although less likely

⁴ Id. Although justice Blackmun is referring to the 14th Amendment to the Federal Constitution. The state may grant more expansive protections, which could include the preborn as well as the born.

⁵ “We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.” and “You want a right to abortion? Adopt it the way most rights are adopted in a free society; pass a law. You don't want a right to abortion? Pass a law the other way.” Justice Scalia speech to the Manhattan Institute for Policy Research, 1997.

⁶ In *Gonzales v. Oregon*, 546 U.S. 243 (2006), Justice Kennedy wrote the majority opinion in favor of states rights, finding that Congress was far from clear as to its intent to preempt Oregon's efforts to deal with fundamental questions about life and death.

⁷ “Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.” Thomas Dissent, *Stenberg V. Carhart*, 530 U.S. 914 (2000)

⁸ “I think it was part of the genius of the founding fathers to establish a federal system, with a national government to address issues of national concern; state and local government more close to the people to address issues of state and local concern. Obviously, issues of overlap as well.” Senate Confirmation hearings. *The New York Times* (Sept. 14, 2005)

⁹ “I believe very strongly in limited government, federalism, free enterprise, the supremacy of the elected branches of government, the need for a strong defense and effective law enforcement, and the legitimacy of a government role in protecting traditional values,” Job Application of Samuel Alito to Attorney General Edwin Meese, 1985. Published in the *Washington Post* on Tuesday Nov. 15.

given the makeup of the Court, but one which would still be open to them due to the personhood argument, is that personhood does in fact exist under the 14th amendment and therefore protects all preborn children throughout the United States. In the worst case scenario, the Supreme Court would decide not to hear the case at all or affirms the current status quo.

The members of the Supreme Court have had innumerable chances to overturn Roe v. Wade using incrementalist legislation that sought to work within the framework of Roe v. Wade. Clearly Roe v. Wade is a Catch-22 and anyone who plays the game, loses. The justices will not be tricked into overturning Roe v. Wade, it must be challenged directly. This is what attorney Robert Muike, of the Thomas More Law Center has called the personhood legal train wreck.

Unless we cause this legal train wreck, unless we bring this fundamental challenge, the Supreme Court will not overturn Roe v. Wade. The Supreme Court decides cases in controversy, and so we have to bring a case in controversy that would challenge the essential precept of Roe v. Wade. We know that personhood is the lynchpin of Roe v. Wade, and therefore we believe that personhood is the vehicle to overturn it.

Coincidentally, if personhood were such a bad idea, why are Planned Parenthood, the ACLU, and all major pro-abortion groups doing everything in their power to stop it? It is clear to everyone that we have a great opportunity to overturn Roe if we challenge it directly from a state's rights perspective. We must seize this opportunity.

3. PERSONHOOD IS AN IDEAL VEHICLE FOR COMPREHENSIVE EDUCATION

Personhood provides an ideal vehicle to educate the public of the humanity of the unborn and the inhumanity of abortion, especially at the end of the spectrum where more than 90% of the abortions take place. The history of social reform invariably includes efforts to show the humanity of the victim, and the baby in the womb is as much a victim in the early stages of life as in the more advanced stages. A comprehensive approach to the protection of all persons is just what we need to prick the collective consciousness of the public and to change public opinion. Personhood allows us to speak unabashedly about cloning, stem cell research, embryo destructive medical practices, chemical abortifacients, and all abortions; incremental legislation does not.

The second Partial Birth Abortion litigation was costly and risky, especially after the Supreme Court had struck down one Partial Birth Abortion law only a few years before. But Clark Forsythe, President of Americans United for Life defended it, stating that "by highlighting a particular form of abortion, the Partial Birth Abortion Ban Act brought national public attention to the gruesomeness of abortion more than all previous educational efforts," and that "the Act and the debate surrounding it helped the public better understand the true scope of Roe -- that Roe did not legalize abortion simply in

the first trimester, but up to birth.”¹⁰ But an early term abortion of a 10 or 12 week old baby is just as gruesome. Why shy away from educating people about the inhumanity of these abortions?

The following are some of the criticisms of a personhood approach.

Criticisms:

1. Now is not the time:

When the second Partial Birth Abortion Act was being litigated, the makeup of the Supreme Court was the same as it was less than a decade before, when an almost identical law had been defeated. Even the lawyers for NRLC admitted that they didn't have the votes, but by the time it reached the Supreme Court, O'Connor and Rehnquist were gone and Alito and Roberts were on the bench. For a case to work its way up to the Supreme Court takes many years, and justices may die or retire at any time.

The prudential game of “now is not the time” can go on at perpetuity, but the truth of the matter is that Supreme Court litigation takes a long time, and we never know what will happen in the future. What we do know is that if pro-lifers don't take a shot at our actual goals, we will never have a chance of realizing them. Our goal should be to directly challenge Roe and to grant legal protection to all preborn children.

Looking at the current make up of the Supreme Court, congress, and given the current administration, today, may be the best chance we have in an entire generation. That chance may be gone tomorrow, but what do we lose for trying now that the situation is favorable?

Take Georgia for example; that was a lost opportunity. The Georgia state personhood law had to pass 60% of the senate, 60% of the house and then it would go to a popular vote where it needed 50% support. The proponents of the law had 2/3 in the senate, they nearly the necessary number of votes in the house, and if NRLC and the Bishops had supported them they surely would have had the necessary number of votes. Most significantly, a national polling agency poll of the popular support for the personhood bill found that if the measure had gone to a popular vote, it would have prevailed by 57%. We had a chance, but we couldn't even follow through because it was killed in conference partly by the Bishops and the National Right to Life Committee who testified against it.

By most accounts Justice Kennedy is the swing vote. Kennedy was an NRLC endorsed candidate to the bench and had been publicly held to be pro-life before the 1992 decision in Casey. In that decision, Justice Kennedy changed his vote at the eleventh hour to forge a centrist coalition with justice O'Connor and Souter in order to ease the national tension that we as a nation have over abortion. Yet, O'Connor and Souter's centrist compromise was so devoid of meaning that they couldn't even bring themselves to oppose a partial birth abortion ban that only prohibited the murder of the child if it was

¹⁰ Clark Forsythe. A Lack of Prudence, Human Life Review, Fall 2007.

delivered past the navel. Kennedy dissented in the first partial birth abortion case and wrote the second majority opinion upholding the ban. He must have felt betrayed by the false promise of the “centrist” coalition.

The Supreme Court is waiting for a way to return the regulation and even the prohibition of abortion back to the states. What better way to facilitate this change, than to send a message that the states want to handle this issue, that they have followed the arduous process of amending their own state constitution to regain the right to protect preborn children?

Justice Kennedy was persuaded in 1992 to keep the framework of Roe, and we are convinced that he can be persuaded again to overturn it. It is a crime, it is tragic, to not give him the opportunity to do so. Keep in mind that when Kennedy wrote the majority opinion in the Gonzalez case outlawing partial birth abortion, he didn't reaffirm Roe and Casey, instead he assumed their principles for the purposes of the opinion. Justice Ginsburg recognized this careful use of language for what it was “hostility to Roe and Casey.” Justice Ginsburg sees it, the ACLU sees it, Planned Parenthood sees it, but NRLC, AUL, and the USCCB don't even bother to look at it. As a movement, under the leadership of NRLC, AUL, and the USCCB, we fear losing at the risk of winning. Why?

2. If Roe is challenged directly the Supreme Court will create a federal super abortion right.

First of all we already have a super abortion right. Partial birth abortion only was successful because the “pro-life” lawyers argued that the abortionist had other options to kill the baby that were not prohibited. Parental notification is only allowed if there is a judicial bypass. Fetal homicide bills are only allowed if they exclude abortion. Let's be honest, there is no real limitation on abortion. The only substantive pro-life law that might have had an effect is the prohibition of tax-payer funded abortions.

Justice Kennedy, the justice who was endorsed by NRLC, who tried to forge a centrist coalition in Casey, who dissented in the first Partial Birth Abortion case, who wrote the majority opinion in the last partial birth abortion case, is now, all of a sudden going to turn into an abortion loving crony of justice Ginsburg, demanding public funding of abortion? That will not happen. The worst case scenario is that Kennedy would write a concurring opinion reaffirming the principles of Roe and Casey, and that is exactly where we are today, so what is lost, but an opportunity to get Justice Kennedy to change, take his vote back, and correct the mistake that he made in 1992?

Justice Kennedy is a judge in the twilight of his career and he can see how Roe has corrupted the judicial system. He surely sees that Supreme Court judges are now judged not by their capabilities as legal scholars but by their personal positions on abortion. What better approach than for Justice Kennedy to decide a case where a state has spoken very loudly and very strongly that they want this issue to return to the state? Why don't we at least give the justices a chance!

3. If a state personhood law is passed it could entrench abortion as a state right.

Abortion as a state right is in fact a reality in 16 states¹¹, but in every last one of the 16 states where abortion is a state right, the state courts imposed those rights in response to litigation of incremental abortion legislation.

State constitutional amendments would immediately overturn these state mandated abortion rights since the state courts only have the power to interpret their constitution. If the state constitutions were amended to include the preborn as persons, the state courts' decisions establishing a state right to an abortion would be invalidated.

4. Even if a personhood amendment passes, it does not create a cause of action or a case in controversy, i.e. you wouldn't be able to get into court.

This contention is false in principle and in application.

In principle, the concept of an implied cause of action states that the existence of a remedy for the violation of a right is implied from the importance of the right violated.¹² In other words, you don't need the law to give you permission to sue, when the right that has been violated is fundamental.

Also, there are numerous cases brought to trial every year in which a perpetrator escapes punishment because the preborn child is not considered a person. In Colorado alone, on the very year of the 2008 Personhood Amendment, there were at least two cases in which pregnant mothers and their children were injured or killed, and the suspects escaped prosecution for the harm done to the children, because the children were not considered persons.¹³ If personhood is established in the state constitutions, the courts will have no choice but to include children in the womb as victims of crimes. The defense attorneys would then appeal the definition of a person under the state constitution creating a very good case for personhood, and a definite case in controversy.

¹¹ Alaska, Arizona, California, Connecticut, Florida, Illinois, Indiana, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Tennessee, Vermont, West Virginia.

¹² Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

¹³ "A judge in Mesa County says a man accused in a car crash in which a pregnant woman lost her baby will not face a murder charge. Prosecutors plan to appeal. The suspect still faces other charges. Logan Lage was charged with "first-degree murder, extreme indifference" and 16 other charges after a head-on crash in November. Authorities say his vehicle struck a vehicle driven by Shea Lehnen, who was eight-and-a-half months pregnant. Doctors delivered the baby alive, but she died hours later. Mesa County Deputy Coroner Rob Kurtzman ruled the baby's death a homicide. **Mesa County District Judge Richard Gurley ruled this week that at the time of the crash, Lileigh Lehnen was not yet a person.** The judge dismissed the murder charge along with charges of vehicular homicide, child abuse-recklessly causing death, vehicular eluding resulting in death, careless driving resulting in death, and vehicular assault-driving under the influence. Other charges remain."

<http://www.9news.com/news/local/article.aspx?storyid=88592>

See Also. **Lawyers Argue Baby Killed After Crash 'Not Real Person'**
<http://www.thedenverchannel.com/news/15529047/detail.html>

In application, the truth of matter is that pro-abortion forces will file for a preliminary injunction and a facial challenge in federal court as soon as the amendment passes.

Abortion proponents challenge every pro-life law, even when they are insignificant. Surely, they wouldn't wait to challenge a law that directly challenges Roe v. Wade. Also, and more cynically, abortion proponents challenge pro-life laws as a way of fundraising. Why would they decide not to challenge a personhood law? No, those attorneys who contend that personhood laws will never get into court are quite simply wrong.

5. If this amendment passes it is going to repeal by implication all of these regulations that we have in place and we are going to have to start all over again.

Courts look very unfavorably on the prospect of repealing laws by implication. If a provision from a statute is itself enjoined then the rest of the statute is revived by implication, but if it is not enjoined then there is no need for repeal by implication. What courts look for when there is conflict is that the provisions themselves must plainly conflict. If a personhood amendment is passed, it will immediately be litigated and will be under an injunction until the case is settled. If personhood survived the challenge and overturned Roe, then there would be no need for the current "restrictions", and if it was defeated, then the restrictions would not be affected.

This argument, simply does not hold any water, and certainly should not justify undermining personhood challenges to Roe.

IN CONCLUSION

The pro-abortion side, for all it's talk of civil dialogue and working together, is very clear where it draws the line: no fetal personhood.¹⁴ Let us also be clear, there won't be any stealth pro-life judges appointed by this administration. For the current administration, abortion is non-negotiable. Why can't we say the same from our side? Are our beliefs not deeply held? By not having a strategy where we always make the point to end abortion we have in fact made abortion negotiable.

Incremental legislation, like the Partial Birth Abortion Ban may have some positive educational attributes, but when even Senator Moynihan from NY is able to support the partial birth abortion ban, while at the very same time being an unapologetic pro-abortion Senator, isn't it obvious that incrementalist legislation is simply providing cover for politicians, and diluting what it means to be pro-life?

¹⁴ "Other bills take the form of "fetal personhood" measures, which grant constitutional and statutory rights to fetuses, sometimes even from the moment of fertilization. These bills are intended to elevate the status of the fetus and challenge abortion rights, can be used to prosecute abortion and reproductive health care providers for their actions." Center for Reproductive Rights.

Engaging Policymakers in the States: Key Areas of the Center's Work. 03/05/09. <http://reproductiverights.org/en/project/engaging-policymakers-in-the-states-key-areas-of-the-centers-work>

We have an opportunity with personhood laws at the state level, and we have to take it now. Every day more innocent children are dying. We have four justices that we can rely on to overturn Roe v. Wade and one justice who is a wild card. When will we have an opportunity as good as this? If we don't take this opportunity it will be a crime because it may be another 36 years before we have this good of an opportunity again.

Most importantly let us not forget that above all predictions and strategies we must first attempt to do the right thing, regardless of the predicted outcome. For let us remember the famous words of Abraham Lincoln who said "Sir, my concern is not whether God is on our side; my greatest concern is to be on God's side, for God is always right."

Let us not be concerned with lobbyists, politicians, lawyers, and judges; instead, let us be concerned with being on the side of God -who would not wish us to sacrifice even one innocent child for the sake of "strategy"- for God is always right.