

FROM: PRAWFSBLOG

PERSONHOOD

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MISSISSIPPI'S PERSONHOOD AMENDMENT

The NY Times has just run [this op-ed](#)¹ I authored (along with [Jonathan Wills](#)²) on Mississippi's proposed Personhood Amendment 26, which is up for a vote on November 8. Here is the initiative's official description:

Initiative #26 would amend the Mississippi Constitution to define the word 'person' or 'persons', as those terms are used in Article III of the state constitution, to include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."

Jonathan and I argue in the op-ed that whether one is pro-life or pro-choice, the amendment is a bad idea because it is ambiguous in two key ways: (1) that "fertilization" could mean anything from the moment sperm penetrates egg to the moment the fertilize egg implants in the uterus (or does not, in the case of IVF embryos that are not used), thus it is unclear whether it sweeps in some forms of birth control, IVF embryo discard, and stem cell derivation along

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¹ www.nytimes.com/2011/10/31/opinion/mississippi-ambiguous-personhood-amendment.html?_r=2&ref=opinion.

² law.mc.edu/faculty-staff/faculty/will/.

with abortion. (2) It is unclear whether the Amendment is self-executing and thus updates the criminal code among other pieces of law, or whether it instead would require legislative action to do so piece-by-piece. We argue that without a clear amendment, Missisippians can't know what they are voting for. Moreover, if courts are inclined to read the ambiguities in a way to avoid raising federal constitutional questions, even pro-life groups hoping to offer the courts an opportunity to revisit *Roe* may not get what they want with an ambiguous amendment.

I will have more to say about this Amendment during my blogging stint this month, but I just want to make one observation based on my experience in a public debate in Mississippi³ that I participated in.

Here I should make clear I am speaking only for myself, and not Jonathan:

During the debate, it felt a good deal like the pro-life groups seemed to want to have it both ways on the self-executing question when I pushed them on this during the debate. If it is not self-executing, if it just a statement of "policy" or "principle" without legal effect, it is unclear why they are pushing this amendment so hard politically and financially. They accused me of "fear mongering," and I am too close to this to be objective on the issue, but I do harbor this fear I want to share (if not "monger"): I fear some groups are pushing an ambiguous amendment they hope they can slip by Mississippi voters by protesting against its likely implications as to IVF and abortion, only then to press the courts to rely on the amendment as having altered criminal other laws in the state once it is in effect, impacting a good deal of reproductive practices. I am not trying to cast aspersions on the views of those supporting this amendment. I am sure their motivations are complex, heterogeneous, and in some cases overdetermined. I think abortion is actually a hard question from a bioethics perspective, and understand where disagreements on the subject come from. But I found the positions they took on the self-executing question downright peculi-

³ www.cbsnews.com/8301-201_162-20126236/debating-mississippi-personhood-amendment/.

ar, and I have yet to hear a straight answer from supporters of the law that they do not think it self-executing. Until they publicly take that stand, I will continue pressing (if not “mongering”) this fear.

THE CONSTITUTIONALITY OF MISSISSIPPI’S PERSONHOOD AMENDMENT IF IT PASSES

I earlier shared my thoughts on the ambiguity of the Mississippi personhood amendment. In this blog post I focus on the question of its constitutionality.

While I have seen state courts apply the constitutional avoidance canon to state statutes, I have never seen it applied to the meaning of the a ballot initiative, but it is possible the courts will in any event resolve the question I discussed in my [last post](#)⁴ of whether the Amendment is self-executing in such a way that will allow the courts to avoid having to face a possible conflict with the federal constitution.

If not, and the [ambiguity of “fertilization”](#)⁵ is resolved to cover everything from the moment that sperm penetrates egg, the amendment ([if self-executing](#)⁶) may criminalize some forms of birth control, destruction of excess embryos fertilized as part of IVF, stem cell derivation, and abortion (pre and post-viability).

Let me take those contexts one by one.

As-applied to prohibit pre-viability abortions, the amendment obviously conflicts with *Roe* and *Casey*. Of course, some supporters of this amendment know that and want to offer the Supreme Court an opportunity to reverse these decisions, but I think the fetal pain abortion bans I have written about (with Sad Sayeed) [elsewhere](#)⁷ in other states are actually a more likely way to get the Court to revisit the issue, although we ultimately think they too are unconstitutional for the reasons we set out in that article.

What about the application of the amendment to criminalize de-

⁴ prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippis-personhood-amendment.html.

⁵ *Id.*

⁶ *Id.*

⁷ papers.ssrn.com/sol3/papers.cfm?abstract_id=1805904.

stroying embryos fertilized for IVF but discarded when not needed – that is to force all embryos to be available for embryo adoption? Here the issue will turn on whether there is a federal constitutional right not to procreate (or as I prefer to put it rights not to procreate). I have written about those issues⁸ in the context of courts looking for such a right to resolve embryo disposition disputes. In that article I expressed some doubt as to whether there exists a right not to be a genetic parent when unbundled from unwanted gestational and legal parenthood, but I also raised some arguments as to state action and waiver which seem less relevant in this context. There is also a practical question of whether the ban may be evaded by engaging in indefinite freezing rather than either destruction or adoption.

As applied to a ban on stem cell derivation, I am unsure there is a federal constitutional problem, especially if *Abigail Alliance*⁹ (full disclosure, I represented DOJ in this matter) is accepted as stating the law in the area. If anything, because stem cells are further away from therapeutics at the moment, if anything the argument seems weaker than that in *Abigail Alliance*.

As applied to certain forms of birth control that terminate pregnancy after the sperm penetrates the egg, I am less sure of my view. Following *Griswold*, *Carey*, and *Eisenstadt* (if read as due process not equal protection), there seems to be an infringement of a fundamental right. However, perhaps the state could argue the availability of pre-fertilization forms of birth control means such a ban could survive strict scrutiny. One can think of this as the birth control equivalent to the most recent *Carhart* decision on the partial birth abortion procedure, that the state may be permissibly rule out some forms of contraception as long as some remain open. That said, so much of the *Carhart* opinion was based on Kennedy's views about women regretting their abortion decisions, which my colleague Jeannie Suk among others has written about,¹⁰ that one might think the opinion

⁸ papers.ssrn.com/sol3/papers.cfm?abstract_id=1114806.

⁹ en.wikipedia.org/wiki/Abigail_Alliance_v._von_Eschenbach.

¹⁰ www.columbialawreview.org/articles/the-trajectory-of-trauma-bodies-and-minds-of-abortion-discourse.

very much limited to abortion and even then not something to bank on.

Thus on my reading the constitutionality would vary dramatically based on as-applied context. Still, these thoughts are very tentative and I would love to hear what others think.

STEM CELLS, IVF, AND ABORTION: IS THERE A RIGHT AND LEFT POSITION?

This is my third post inspired by the Mississippi Personhood Amendment, and this one turns to the normative issues.

Many people who identify as pro-life as to abortion, oppose stem cell derivation involving the destruction of pre-embryos (or “embryos” simpliciter if you prefer, language is power), and often discard of embryos as part of IVF. Many people who are pro-choice by contrast oppose prohibitions on abortion, stem cell derivation, or IVF embryo discard. What I try to show my students in the classes I teach,¹¹ and I want to argue here, the three issues do not necessarily go together and the terrain is more complicated than the way it is usually presented.

First, for the left. As Judith Jarvis Thompson most famously tried to show in her (still quite controversial) work, support for an abortion right is not necessarily inconsistent with recognition of fetal personhood. That is, even if one believes fetuses are full persons, one can still support a right not to be a gestational parent (to use my terminology¹²) for women that stems from bodily integrity or perhaps autonomy. As I have argued, as a normative¹³ and as a constitutional¹⁴ matter recognition of a right not to be a gestational parent does not necessarily imply recognition of a right not to be a genetic parent, which suggests that the abortion right and the right to engage in IVF discard are quite severable because prohibiting the destruction of excess IVF embryos does not require forcing unwanted gestational duties on anyone. The disconnect is even stronger when

¹¹ www.law.harvard.edu/academics/curriculum/catalog/.

¹² papers.ssrn.com/sol3/papers.cfm?abstract_id=1116269.

¹³ *Id.*

¹⁴ papers.ssrn.com/sol3/papers.cfm?abstract_id=1114806.

it comes to stem cell derivation, where none of the “rights not to procreate” is involved. That means that one can very happily be pro-choice as to abortion, and prohibit embryo discard or destruction via stem cell derivation.

Second, as to the right

Let us assume the pro-life position on abortion depends on the view that fetuses are persons or close enough to persons that their protection trumps the interests in avoiding gestational parenthood of pregnant mothers. That position does not imply that the destruction of embryos at all stages of development is also equally problematic. A lot depends on one’s theory of why fetuses should be given personhood or rights claims against destruction (on this issue I highly recommend Cynthia Cohen’s chapter on personhood in her book¹⁵ on stem cells). If your theory of personhood is about the actual possession of criteria X, on some ways to fill in “X” – such as fetal pain, which I have written about here¹⁶ – fetuses late in gestation may possess the criteria but not embryos as the stage they are discarded/destroyed as part of IVF or stem cell derivation. Similarly, many have defended a 14-day or later view of personhood, where personhood begins on the 14th day after fertilization where embryonic twinning – the potential for an embryo to become monozygotic twins – ends. This argument is usually premised on problems with numerical identity. If the embryo was a person before day 14, but twins into two people, which one was it – person A or person B? Many find this argument persuasive, although certainly there are objectors (for example, those who say that if a stick is broken into two that does not mean it wasn’t originally one stick, though others doubt the analogy). For present purposes all I want to suggest is someone who opposes abortion can thus fairly easily consistently oppose prohibition on destruction of early embryos.

None of that means that zealots on either side are capable of being nuanced here. The cultural cognition project,¹⁷ if anything, sug-

¹⁵ www.oup.com/us/catalog/general/subject/Medicine/Ethics/?view=usa&ci=9780195305241.

¹⁶ papers.ssrn.com/sol3/papers.cfm?abstract_id=1805904.

¹⁷ www.culturalcognition.net/.

gests the opposite. Still I hope that judges and academics are better poised to see the nuances here.

LIFE, HUMANITY, AND PERSONHOOD . . . A SOURCE OF SOME CONFUSION

In the [comments to one of my prior posts](#)¹⁸ one of the commentators (Lifeisbeautiful) makes some statements regarding living and its impact on the abortion debate. I think it more likely than not this was not an attempt to engage in serious debate, but in any event I think the comment helps point out a bit of equivocation or confusion that is common in these debates.

We ought to distinguish (at least) three questions:

Life: Is X living or not living?

Human: Is X a member of the human species, or not?

Person: Is X a person or not – and by person here we mean the bearer of a set of moral and legal rights, the most important of which is that they are inviolable?

The relation of these three concepts, though, is non-obvious and depends on an argumentation.

One could have a view that if X has LIFE + is HUMAN, then X is a PERSON. This would treat being living humans as sufficient for personhood.

One could have a view that ONLY living humans are persons, this would treat those conditions as necessary.

Neither proposition is self-evidently true

Defenders of what might be referred to as a “quality X” view of personhood for instance, would disagree. If your quality X is the capacity for rational reasoning, you might treat certain living non-humans (like intelligent apes, or intelligent aliens if they ever show up) as persons. You may also exclude some living humans from personhood, for example ancephalic children or the severely retarded.

Peter Singer, for example, famously argues that views that

¹⁸ prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippi-personhood-amendment.html#comments.

equate being human with being a person, and exclude non-human animals from personhood definitionally are “speciesist” and that this is a kind of discrimination equivalent to racism.

There are still further nuances: what is the right quality or joint set of qualities to fill in “quality X”? Does one have to actually possess quality X at the time in order to be a person, or is it enough to have the potential to possess quality X in the ordinary course of things? What does the “ordinary course of things” mean, for instance is human sperm standing alone the kind of thing that in the ordinary course of things will have the potential for quality X? Is a fetus that is gestating? Can a line be drawn? There are further questions about non-living humans, and their relationship to personhood, which may govern how we treat the dead. Finally, there are questions about the relationship between moral and legal personhood, and within legal personhood between constitutional and non-constitutional conceptions of personhood.

One can only get at these very hard and interesting questions, though, if one is careful to note the possibility that being living, being human, and being a person are three separate concepts whose interactions are complex and not self-evident. //