

2018

# Personhood Seeking New Life with Republican Control

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## Recommended Citation

93 Ind. L. J. 499 (2018).

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# Personhood Seeking New Life with Republican Control\*

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*Just three days prior to the inauguration of Donald J. Trump as President of the United States, Representative Jody B. Hice (R-GA) introduced the Sanctity of Human Life Act (H.R. 586), which, if enacted, would provide that the rights associated with legal personhood begin at fertilization. Then, in October 2017, the Department of Health and Human Services released its draft strategic plan, which identifies a core policy of protecting Americans at every stage of life, beginning at conception. While often touted as a means to outlaw abortion, protecting the “lives” of single-celled zygotes may also have implications for the practice of reproductive medicine and research. Indeed, such personhood efforts stand apart and distinct from more incremental attempts to restrict abortion that target the abortion procedure and those who would perform it. While personhood efforts have not been successful to date at either the state or federal levels, abortion opponents may find a friend in President Trump and his Supreme Court nominees. What is more, because the recent decision by the Court in Whole Woman’s Health v. Hellerstedt makes it more difficult for states to impose incremental restrictions on the abortion procedure, restrictions focused on the status of the unborn may assume increasing importance. Personhood rhetoric is often seen in proceedings involving the disposition of unused embryos and in laws that restrict access to abortion on the basis of gender, race, or disability. Laws outlawing abortion on the basis of fetal pain are also on the rise. With so much uncertainty surrounding the political landscape, this Article places the personhood movement in historical context with other antiabortion strategies. This Article further explores the theoretical underpinnings of the personhood movement and considers its future prospects with regard to abortion and other reproductive services.*

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## INTRODUCTION

On January 17, 2017, just three days before the inauguration of Donald J. Trump, Representative Jody B. Hice (R-GA) introduced H.R. 586, the Sanctity of Human Life Act, which states that “the life of each human being begins with fertilization, cloning, or its functional equivalent . . . at which time every human being shall have all the legal and constitutional attributes and privileges of personhood.”<sup>1</sup> More recently, in October 2017, the Department of Health and Human Services (HHS), released a draft of its strategic plan for Fiscal Years 2018–2022, stating that “HHS accomplishes its mission through programs and initiatives that cover a wide spectrum of sixty-one activities, serving and protecting Americans at every stage of life, beginning at conception.”<sup>2</sup> At the state level, in 2014 the citizens of Colorado<sup>3</sup> and North Dakota<sup>4</sup> considered and rejected proposed amendments to their state constitutions that would have extended the legal definition of personhood to the earliest stages of human development. As of this writing, at least ten other states are considering similar measures (Alabama,<sup>5</sup> Arkansas,<sup>6</sup> Indiana,<sup>7</sup> Iowa,<sup>8</sup> Kansas,<sup>9</sup> Missouri,<sup>10</sup> South Carolina,<sup>11</sup> Tennessee,<sup>12</sup> Texas,<sup>13</sup> and Washington<sup>14</sup>). Concurrently,

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1. Sanctity of Human Life Act, H.R. 586, 115th Cong. § 2(1)(B) (2017).

2. Christianna Silva, *The Department in Charge of the Nation's Health Care Says Life Begins at Conception*, NEWSWEEK (Oct. 13, 2017, 6:14 PM), <http://www.newsweek.com/departments-charge-nations-health-care-hhs-says-life-begins-conception-684814> [<https://perma.cc/2NLK-DGP3>].

3. Colo. Amend. 67 (2014), <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2013-2014/5Final.pdf> [<https://perma.cc/NA36-XG32>] (proposing COLO. CONST. art. XVIII, § 17).

4. S. Con. Res. 4009, 63d Legis. Assemb., Reg. Sess. (N.D. 2013), <http://www.legis.nd.gov/assembly/63-2013/documents/13-3060-04000.pdf> [<https://perma.cc/PTG3-2WD3>] (proposing new section to N.D. CONST. art. I).

5. H.B. 98, 2017 Leg., Reg. Sess. (Ala. 2017), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2017RS/PrintFiles/HB98-int.pdf> [<https://perma.cc/8HTN-BH3T>].

6. S.J. Res. 9, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), <http://www.arkleg.state.ar.us/assembly/2017/2017R/Bills/SJR9.pdf> [<https://perma.cc/8CJK-SQ3D>].

7. H.B. 1134, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017), <https://iga.in.gov/static-documents/1/6/9/c/169c5a8e/HB1134.01.INTR.pdf> [<https://perma.cc/BZ8P-3RMY>].

8. H.B. 297, 87th Gen. Assemb. (Iowa 2017), <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF297> [<https://perma.cc/NH2A-CSTU>].

9. H. Con. Res. 5009, 2017 Leg. (Kan. 2017), [http://kslegislature.org/li/b2017\\_18/measures/documents/hcr5009\\_00\\_0000.pdf](http://kslegislature.org/li/b2017_18/measures/documents/hcr5009_00_0000.pdf) [<https://perma.cc/B9YT-2778>].

10. H.B. 709, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017), <http://www.house.mo.gov/bill.aspx?bill=HB709&year=2017&code=R> [<https://perma.cc/3V7Y-SGNK>].

11. S. 0217, 122d Sess. (S.C. 2017), <http://www.scstatehouse.gov/billsearch.php?billnumbers=217&session=122&summary=B&PRINT=1> [<https://perma.cc/7MBR-4ZPJ>].

12. H.B. 895, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017), <http://www.capitol.tn.gov/Bills/110/Bill/HB0895.pdf> [<https://perma.cc/U4J7-XMMS>].

13. H.B. 948, 85th Leg., Reg. Sess. (Tex. 2017), <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB948> [<https://perma.cc/XN8S-P5SU>].

14. H.B. 1649, 65th Leg., 2017 Reg. Sess. (Wash. 2017), <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/1649.pdf> [<https://perma.cc/VF3E-BCXF>].

personhood proponents are also pursuing initiatives at the county and municipal levels.<sup>15</sup>

Taken together, these approaches stand apart and distinct from state-level strategies designed to constrain access to abortion through targeted regulation of the procedure proper and of those who perform it, such as laws requiring physicians to have admitting privileges at nearby hospitals.<sup>16</sup> Indeed, the personhood movement is seeking nothing less than to change the legal status of the unborn.<sup>17</sup> While personhood efforts have not been successful to date at either the state or federal levels, changes in the legal and political landscape may offer new opportunities. The election of President Trump and other Republican officials can only be viewed as a victory for abortion opponents. Although Neil Gorsuch, Trump's Supreme Court selection, has not ruled directly on abortion in his time on the bench, he is a noted conservative who has written in the context of medically assisted dying and euthanasia that "all human beings are intrinsically valuable and the intentional taking of human life by private persons is always wrong."<sup>18</sup> At eighty-four, it is also possible that liberal Justice Ruth Bader Ginsburg may leave the bench in the next four years.

What is more, because the recent decision by the Court in *Whole Woman's Health v. Hellerstedt* makes it more difficult for states to impose incremental restrictions on the abortion procedure, we may see increased restrictions focused on the status of the unborn.<sup>19</sup> Personhood rhetoric is already seen in proceedings involving the disposition of unused embryos<sup>20</sup> and in laws that attempt to restrict access to abortion on the basis of gender, race, or disability.<sup>21</sup> Laws outlawing abortion on the basis of fetal

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15. *Personhood Alliance To Launch Municipal Ballot Initiatives on the Wake of the Colorado and North Dakota Votes*, PERSONHOOD (Oct. 29, 2014), <http://www.personhood.org/index.php/press/press-releases/personhood-alliance-to-launch-municipal-ballot-initiatives-on-the-wake-of-the-colorado-and-north-dakota-votes> [<https://perma.cc/4YJN-KQ94>].

16. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

17. Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 578 (2013).

18. NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 4–5 (2006).

19. Steven R. Morrison, *Personhood Amendments After Whole Woman's Health v. Hellerstedt*, 67 CASE W. RES. L. REV. 447, 450 (2016); Jonathan Will, *Whole Woman's Health – Some Preliminary Thoughts on Benefits, Purposes, and Fetal Status*, HARV. LAW PETRIE-FLOM CTR: BILL OF HEALTH (June 29, 2016), <http://blogs.harvard.edu/billofhealth/2016/06/29/whole-womans-health-some-preliminary-thoughts-on-benefits-purposes-and-fetal-status/#more-19219> [<https://perma.cc/U44J-GZ45>].

20. See I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, HASTINGS CTR. REP., July–Aug. 2016, at 13, 13–15; Danielle Mayoras & Andy Mayoras, *Embryo Lawsuit Between Sofia Vergara and Nick Loeb Getting Out of Hand*, FORBES (Nov. 18, 2016, 8:48 AM), <http://www.forbes.com/sites/trialandheirs/2016/11/18/embryo-lawsuit-between-sofia-vergara-and-nick-loeb-getting-out-of-hand/#6a1910b45cd0> [<https://perma.cc/6HMH-2Y6F>].

21. See H.B. 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016), <https://iga.in.gov/static-documents/5/1/b/5/51b52d50/HB1337.05.ENRS.pdf> [<https://perma.cc/9Z3H-37XH>]. The bill was signed into law in March 2016 by then-Governor Michael Pence (now the Vice President of the United States), but it was blocked from going into effect by a federal judge in June 2016. Niki Kelly, *Judge Strikes Down Indiana Abortion Law*, J. GAZETTE (June 30, 2016, 10:08 PM), <http://www.journalgazette.net/news/local/indiana/Judge-strikes-down-Indiana->

pain are also on the rise.<sup>22</sup> With so much uncertainty surrounding the political landscape, this Article places the personhood movement in historical context with other antiabortion strategies. It explores the theoretical underpinnings of the movement and considers its future prospects with regard to abortion and other reproductive services.

### I. EARLY FEDERAL EFFORTS: TARGETING THE U.S. CONSTITUTION

The U.S. Constitution does not define the term “person” nor does it state when life begins. However, Justice Blackmun, author of the majority opinion in *Roe v. Wade*,<sup>23</sup> explicitly addressed the matter when he wrote that “[i]f this suggestion of [fetal] personhood is established, the appellant’s case [arguing in favor of women’s choice], of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>24</sup> Not all legal scholars agree that an acknowledgement of fetal personhood would necessarily lead to the outlawing of abortion.<sup>25</sup> However, it is at least possible that the statement of Justice Blackmun may have fertilized the seed that has since given rise to the personhood movement. Within days of the Supreme Court ruling in *Roe v. Wade*, Representative Lawrence Hogan (R-MD) introduced the very first joint resolution in support of an amendment to the federal Constitution, which would guarantee a right to life to the unborn.<sup>26</sup>

Such efforts at legalizing personhood, whether in 1973 or today, attempt to characterize the unborn as a rights-bearing entity with an eye towards outlawing abortion in nearly all cases. Over the course of the last four decades, continuous attempts have been made to amend the federal Constitution to establish a right to life for the unborn. The National Committee for a Human Life Amendment reports that well over 300 such amendments have been introduced in Congress, of which only one (the Hatch-Eagleton Human Life Federalism Amendment) was the subject of a formal (though negative) vote in the Senate.<sup>27</sup> Collectively, these legislative efforts were hardly limited to the formed fetus. Indeed, repeated congressional efforts to enact the Sanctity of Human Life Act are all about defining legal personhood as beginning at

abortion-law-13867401 [https://perma.cc/989N-KJB2].

22. *State Policies on Later Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [https://perma.cc/2ELS-X5XU] (last updated Oct. 1, 2017).

23. 410 U.S. 113 (1973).

24. *Id.* at 156–57; see Will, *supra* note 17.

25. See generally I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43 J.L. MED. & ETHICS 87 (2015) (discussing how a finding of fetal personhood does not answer the question as to whether pregnant women would be required to support that life by carrying the pregnancy to term); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13 (2013) (same); Will, *supra* note 17 (same).

26. H.R.J. Res. 261, 93d Cong. (1973).

27. *Human Life Amendment*, NAT’L COMMITTEE FOR HUM. LIFE AMEND., <http://www.humanlifeactioncenter.org/issues/human-life-amendment> [https://perma.cc/AKT7-DGRN]; *Human Life Amendment Highlights: United States Congress (1973–2003)*, NAT’L COMMITTEE FOR HUM. LIFE AMEND. (Feb. 6, 2004), <https://www.humanlifeactioncenter.org/sites/default/files/HLAHighlights.pdf> [https://perma.cc/Z97U-F5R5].

the single-celled (zygote) stage of embryonic development.<sup>28</sup> Notwithstanding their different iterations, these personhood efforts at the *federal* level have uniformly failed. In their stead, new antiabortion strategies took center stage in the 1980s.

## II. THE RISE OF THE INCREMENTALIST STRATEGY

Noting the failure of these federal initiatives, organizations such as Americans United for Life and the National Right to Life Committee adopted a more incremental, state-based approach.<sup>29</sup> Rather than focusing on the legal status of the unborn, abortion opponents took to enacting state legislation that chips away at the abortion right by impeding patient access to abortion services. Examples include access-constraining statutes (such as mandatory waiting periods) or the targeted regulation of abortion provider (TRAP) laws (such as requiring admitting privileges in nearby hospitals).<sup>30</sup> Pursuant to the trimester framework of *Roe v. Wade*, these laws, by necessity, were limited to abortion procedures performed beyond the first trimester of gestation.<sup>31</sup> It was not until the 1992 Supreme Court decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>32</sup> that states were empowered to more fully regulate first trimester abortions, which is when nearly ninety percent are performed.<sup>33</sup> By abandoning the trimester framework and by acknowledging that legitimate state interests exist from the outset of pregnancy, *Planned Parenthood v. Casey* paved the way for restrictive statutes limited only by their inability to impose an undue burden that has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.”<sup>34</sup>

With the floodgates open, access-constraining state statutes and TRAP laws mushroomed. An early 2017 report by the Guttmacher Institute documents the enactment of 338 such statutes since 2010.<sup>35</sup> The year 2016 alone witnessed fifty new abortion restrictions enacted by eighteen states.<sup>36</sup> Examples include, but are not

28. See Sanctity of Human Life Act, H.R. 586, 115th Cong. (2017).

29. See Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman’s Health*, 126 YALE L.J.F. 149, 151–56 (2016).

30. See Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER POL’Y REV., Winter 2014, at 9, <https://www.guttmacher.org/sites/default/files/pdfs/pubs/gpr/17/1/gpr170109.pdf> [<https://perma.cc/R8ZM-WZ38>].

31. See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

32. 505 U.S. 833 (1992).

33. GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES (2017), [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_induced\\_abortion\\_5.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion_5.pdf) [<https://perma.cc/H2FS-FSJ8>].

34. *Casey*, 505 U.S. at 877.

35. Elizabeth Nash, Rachel Benson Gold, Zohra Ansari-Thomas, Olivia Cappello & Lizamarie Mohammed, *Policy Trends in the States: 2016*, GUTTMACHER INST. (Jan. 3, 2017), <https://www.guttmacher.org/article/2017/01/policy-trends-states-2016> [<https://perma.cc/9MTV-JM9J>].

36. *Id.* Indeed, as of October 1, 2017, fifty-seven new abortion restrictions had been enacted in 2017 alone. *State Policies on Abortion*, GUTTMACHER INST., <https://>

limited to, waiting periods, mandatory disclosures during the informed consent process, and specification of the width of clinic doorways to mirror ambulatory surgical centers.<sup>37</sup>

When challenged, many of the aforementioned state statutes have been upheld, at least in part, because they were touted as a means of protecting women's health, not unborn lives. And by many accounts, this state-focused, incremental strategy has effectively constrained access to women seeking abortion services.<sup>38</sup> In fact, the heavy wave of legislative restrictions enacted since 2010 has led to the outright closure of fifty abortion-providing clinics nationwide.<sup>39</sup>

However, the tide has turned with *Whole Woman's Health*,<sup>40</sup> wherein the Supreme Court of the United States considered the constitutionality of two abortion restrictions enacted in the Texas Omnibus Abortion Bill (H.B. 2).<sup>41</sup> One provision required abortion providers to secure admitting privileges at nearby hospitals.<sup>42</sup> The other required abortion clinics to meet the regulatory standards applied to ambulatory surgical centers.<sup>43</sup> It was the position of the State of Texas that these requirements were necessary to protect women's health and ensure that there is easy access to hospitals if complications arise during an abortion procedure.<sup>44</sup> However, the Supreme Court rejected these arguments. In determining whether the provisions violated *Casey's* prohibition on placing a substantial obstacle in the path of a woman's choice to abort, Justice Breyer wrote that judges must weigh whether the asserted medical benefits are sufficient to justify the burdens that are imposed upon access.<sup>45</sup> The Court ultimately struck down the law in question with Breyer noting the "virtual absence of any health benefit" provided as compared with the burdens imposed.<sup>46</sup> Perhaps implicit in this message was the conviction that the real purpose of HB 2 was to protect as many unborn lives as possible. As a practical matter, twenty-one of the forty abortion providers in Texas closed their doors after the enactment of HB 2, and only one has reopened since the law was struck down

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[www.guttmacher.org/united-states/abortion/state-policies-abortion](http://www.guttmacher.org/united-states/abortion/state-policies-abortion) [<https://perma.cc/5UL2-UWH3>] (last updated Oct. 1, 2017).

37. See Boonstra & Nash, *supra* note 30. Certain states impose waiting periods that vary in length from eighteen to seventy-two hours. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/29H5-8SLE>] (last updated Oct. 1, 2017).

38. See generally MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015) (providing a detailed analysis of the history of abortion restrictions).

39. Laura Bassett, *Anti-Abortion Laws Take Dramatic Toll on Clinics Nationwide*, HUFFPOST (Sept. 25, 2014), [http://www.huffingtonpost.com/2013/08/26/abortion-clinic-closures\\_n\\_3804529.html](http://www.huffingtonpost.com/2013/08/26/abortion-clinic-closures_n_3804529.html) [<https://perma.cc/YR6L-MB6F>].

40. 136 S. Ct. 2292 (2016).

41. H.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013), <http://www.legis.state.tx.us/tlodocs/832/billtext/pdf/HB000021.pdf> [<https://perma.cc/KP5Y-6CH7>].

42. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2017).

43. *Id.* § 245.010(a).

44. *Whole Woman's Health*, 136 S. Ct. at 2311.

45. *Id.* at 2309–10.

46. *Id.* at 2313.

by the Supreme Court.<sup>47</sup> A similar admitting privilege law in Mississippi (also found unconstitutional) would have closed the only remaining licensed abortion clinic in that state.<sup>48</sup>

The long-term impact of *Whole Woman's Health* remains unclear. However, the Supreme Court did affirmatively authorize lower courts to take a harder look at the purported benefits of TRAP laws to maternal health.<sup>49</sup> This will undoubtedly make it easier for courts to find these laws unconstitutional, as the Court was far less deferential to legislative assertions here than it seemed to be a decade earlier in *Gonzales v. Carhart*.<sup>50</sup> It is important to note, however, that HB 2 focused on the abortion procedure and those who would perform it as opposed to the status of the unborn. Thus, the *Whole Woman's Health* ruling does not speak to the constitutionality of state laws that have been enacted to restrict abortion on the basis of fetal pain (seventeen states),<sup>51</sup> gender (seven states), race, or disability (one state each, though with others being proposed).<sup>52</sup> These latter laws, although not typical of the personhood movement, are more in line with the spirit of personhood efforts to focus on fetal status than they are to the incrementalist restrictions discussed above, and are likely to be pursued in greater numbers in the wake of *Whole Woman's Health*.

Notwithstanding the successes of the incrementalist strategy at restricting access pre-*Whole Woman's Health*, which included a Supreme Court victory that saw the federal partial birth abortion ban upheld,<sup>53</sup> some abortion opponents have never been convinced of the strategy's ultimate value.<sup>54</sup> After all, even Justice Ginsburg (dissenting in *Gonzales v. Carhart*) suggested that the ban would not save a single unborn life given the availability of alternative later-term procedures,<sup>55</sup> nor does the ban address the more commonly performed early abortion procedures. Viewed in this light, these minor, incremental victories are hardly winning the war. The National Personhood Alliance, founded by Daniel Becker, has adopted a "no exceptions" strategy, which would oppose any measure that "identifies a class of

47. Alex Zielinski, *First Abortion Clinic To Reopen After Texas Law Forces 21 To Close*, SAN ANTONIO CURRENT (Mar. 16, 2017, 3:09 PM), <http://www.sacurrent.com/the-daily/archives/2017/03/16/first-abortion-clinic-to-reopen-after-texas-law-forces-21-to-close> [<https://perma.cc/849S-L437>].

48. Jackson Women's Health Org. v. Currier, 760 F.3d 448, 449 (5th Cir. 2014).

49. See Greenhouse & Siegel, *supra* note 29, at 156–57.

50. 550 U.S. 124, 161–66 (2007).

51. *State Policies on Later Abortions*, *supra* note 22.

52. *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> [<https://perma.cc/82U8-NRZB>] (last updated Oct. 1, 2017).

53. See *Gonzales v. Carhart*, 550 U.S. at 168.

54. Miranda Blue, *The Personhood Movement: Regrouping After Defeat: Part 4*, RIGHT WING WATCH (Jan. 28, 2015, 2:20 PM), <http://www.rightwingwatch.org/content/personhood-movement-infighting-anti-choice-ranks-part-4> [<https://perma.cc/GJP9-F42Q>]; Cal Zastrow, PROLIFE PROFILES, <http://prolifeprofiles.com/zastrow> [<https://perma.cc/UWA4-VR9J>]; *Who Is Personhood Alliance?*, PERSONHOOD (Apr. 30, 2014), <https://www.personhood.org/index.php/press/who-is-national-personhood-alliance> [<https://perma.cc/Y2WF-DMFV>].

55. *Gonzales v. Carhart*, 550 U.S. at 181 (Ginsburg, J., dissenting).

human beings that we may kill with impunity” (for example, fetuses that are the product of rape).<sup>56</sup> For some abortion opponents, then, it was time to renew the emphasis on the legal status of all the unborn through the lens of personhood, and this time at the state level.

### III. RECENT STATE EFFORTS: THE REEMERGENCE OF THE PERSONHOOD MOVEMENT

Stung by the failure of efforts at the federal level and disenchanted with the incrementalist approach, the modern personhood movement resolved to focus its efforts on constitution-amending initiatives at the state level.<sup>57</sup> The charge is led by Personhood USA and its state-level affiliates. Founded by Keith Mason and Cal Zastrow, Personhood USA is self-described as a nonprofit Christian ministry focused on changing the constitutional status of the preborn.<sup>58</sup> The first attempt at a constitutional amendment was launched in 2008 by Colorado for Equal Rights.<sup>59</sup> If successful, the measure would have amended the state constitution to define legal personhood as “any human being from the moment of fertilization.”<sup>60</sup> Although the measure failed, the attendant debates received national media attention, bringing the personhood movement back into the spotlight after a nearly thirty-year hiatus.<sup>61</sup> The goal of the state personhood initiatives was (and remains) straightforward. With the preborn accorded legal personhood, nearly any abortion would violate the homicide laws of virtually every state. Thus, failure to close abortion clinics could result in women and/or abortion providers facing criminal prosecution. On their view, this imposition of undue burden could, in turn, foster a federal constitutional challenge thereby giving the Supreme Court an opportunity to overturn *Roe v. Wade*,<sup>62</sup> *Planned Parenthood v. Casey*, and now *Whole Woman’s Health*. None of these projections materialized. Since 2008, personhood measures have been introduced (and failed) in over a dozen states.<sup>63</sup> Indeed, only a few of these measures have

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56. Blue, *supra* note 54.

57. See Will, *supra* note 17, at 583–86.

58. See Cal Zastrow, *supra* note 54.

59. See Will, *supra* note 17, at 579–80.

60. Colo. Amend. 48 (2008), <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2007-2008/Final36-0708.pdf> [<https://perma.cc/69FX-UZWQ>] (proposing COLO. CONST. art. II, § 31).

61. See, e.g., Electa Draper, “Personhood” Push Rejected, DENVER POST (Nov. 4, 2008, 2:27 PM), <http://www.denverpost.com/2008/11/04/personhood-push-rejected> [<https://perma.cc/8FJC-LES7>]; Ashley Surdin, *Colorado Voters Will Be Asked When ‘Personhood’ Begins*, WASH. POST (July 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/12/AR2008071201615.html> [<https://perma.cc/D54F-XPET>].

62. See *What Is a State Personhood Amendment*, PERSONHOOD (Nov. 4, 2014), <https://www.personhood.org/strategy/574-what-is-a-state-personhood-amendment> [<https://perma.cc/T3CT-TKHN>] (affirming the belief that a personhood amendment would provide “a direct challenge to the central holding of *Roe v. Wade*”).

63. NARAL PRO-CHOICE AMERICA, “PERSONHOOD” MEASURES: EXTREME AND DANGEROUS ATTEMPTS TO BAN ABORTION (2017), <http://www.prochoiceamerica.org/wp->

reached the ballot as in Colorado (three times),<sup>64</sup> Mississippi (once),<sup>65</sup> and North Dakota (once).<sup>66</sup>

The repeated failure of these state constitution-amending initiatives may have been due, in part, to their potential non-abortion impact.<sup>67</sup> After all, the personhood movement seeks to confer personhood on the zygote, that is, the single-celled embryo which comes to be within hours of a sperm penetrating an egg.<sup>68</sup> According to this view, this newly cognizable member of the human species would and should be entitled to legal protection as a matter of course. It follows that objections to the destruction of the single-celled zygote would by extension apply to in vitro fertilization (IVF). After all, many techniques commonly utilized during IVF create risks for the embryos involved, such as freezing and thawing when more embryos are created than are used in a given transfer cycle.<sup>69</sup> Similar objections would apply to the potential loss or destruction of embryos at more advanced stages of development such as the day-three cleavage-stage embryo (used in preimplantation genetic diagnosis) and the day-five preimplantation blastocyst (used in preimplantation genetic screening).<sup>70</sup> To be sure, because no clinic boasts a 100% success rate, the risks associated with merely transferring an “embryonic person” for hopeful implantation could be viewed as problematic under a personhood framework.<sup>71</sup>

content/uploads/2017/01/5.-Personhood-Measures-Extreme-and-Dangerous-Attempts-to-Ban-Abortion.pdf [https://perma.cc/ZP7B-WJ6B].

64. Colo. Amend. 67 (2014), <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2013-2014/5Final.pdf> [https://perma.cc/U6EG-EE2C] (proposing COLO. CONST. art. XVIII, § 17); Colo. Amend. 62 (2010), [http://www.leg.state.co.us/lcs/Initiative%20Referendum/0910InitRefr.nsf/dac421ef79ad243487256def0067c1de/0c8b000aeb0ee0d3872575e7006427de/\\$FILE/2009-2010%20%2325.pdf](http://www.leg.state.co.us/lcs/Initiative%20Referendum/0910InitRefr.nsf/dac421ef79ad243487256def0067c1de/0c8b000aeb0ee0d3872575e7006427de/$FILE/2009-2010%20%2325.pdf) [https://perma.cc/MZ82-6R3Q] (proposing COLO. CONST. art. II, § 32); Colo. Amend. 48 (2008), <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2007-2008/Final36-0708.pdf> [https://perma.cc/XV4N-NC7V] (proposing COLO. CONST. art. II, § 31).

65. MISS. SEC’Y OF STATE, INITIATIVE 26: DEFINITION OF ‘PERSON’ (2011), <http://www.sos.ms.gov/initiatives/Definition%20of%20Person-PW%20Revised.pdf> [https://perma.cc/9K25-8F7U] (discussing proposed MISS. CONST. art. III, § 33).

66. S. Con. Res. 4009, 63d Legis. Assemb., Reg. Sess. (N.D. 2013), <http://www.legis.nd.gov/assembly/63-2013/documents/13-3060-04000.pdf?20130624132237> [https://perma.cc/9K25-8F7U] (proposing new section to N.D. CONST. art. I).

67. See Will, *supra* note 17, at 585–86.

68. See Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199, 205–15 (2006).

69. See Bridget M. Fuselier, *The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model To Resolve Disputes over Cryopreserved Pre-Embryos*, 14 TEX. J. ON C.L. & C.R. 143, 146–47 (2009).

70. See generally Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL’Y L. & ETHICS 283, 290–93 (2008) (discussing the process of preimplantation screening and diagnosis); Peters, *supra* note 68, at 210–16 (same).

71. See Will, *supra* note 17, at 601.

Certain forms of contraception could also pose problems.<sup>72</sup> Known abortifacients such as mifepristone (RU-486) that cause an embryo or fetus to detach from the uterine wall at up to seventy days gestation<sup>73</sup> could be outlawed. Emergency contraception (such as Plan B) and other frequently used hormonal contraceptives may also raise concerns to the extent they are effective in preventing pregnancy after a single-celled zygote is formed. For instance, although still subject to significant debate, hormonal contraceptives (including certain forms of emergency contraception) are thought to have three potential mechanisms of operation.<sup>74</sup> The first two, preventing ovulation of a mature ova or preventing the sperm from reaching the egg, would not be problematic under a personhood framework; however, the third, making the endometrium inhospitable to implantation of a fertilized ova, would create personhood problems.<sup>75</sup>

The extent to which hormonal contraceptives might prevent implantation of a fertilized ova is not settled. Indeed, the different types of hormonal combinations may well matter. For instance, while progesterone-only contraceptives may act on the uterine lining, preparations that combine both estrogen and progesterone may not have sufficient levels of progesterone to have a postfertilization impact if breakthrough ovulation occurs.<sup>76</sup> Determining exactly what prevented a pregnancy from occurring in any given month where hormonal contraceptives are used may prove impossible. The same would be true for intrauterine devices (IUDs) whose protective effect might occur after fertilization, in particular for the nonhormonal variations.<sup>77</sup> Even the slightest risk that a “person” came into existence and was destroyed by virtue of contraception could be enough to trigger restrictions on access to at least certain forms of contraception, particularly given the availability of alternatives.

Viewed in aggregate, the potential impact of a constitutional personhood amendment on IVF and/or contraception may account for the fact that personhood efforts do not enjoy undivided (or even majoritarian) support within the antiabortion ranks.<sup>78</sup> Early in 2015, infighting along these lines transpired in the Colorado legislature over the funding of an award-winning IUD program shown to reduce the incidence of teen

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72. See Jonathan F. Will, *Conscience Legislation, the Personhood Movement, and Access to Emergency Contraception*, 4 FAULKNER L. REV. 411, 420–24 (2013).

73. See *Mifeprex (Mifepristone) Information*, U.S. FOOD & DRUG ADMIN. (Mar. 30, 2016), <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111323.htm> [https://perma.cc/S7BE-55AY].

74. Walter L. Larimore & Joseph B. Stanford, *Postfertilization Effects of Oral Contraceptives and Their Relationship to Informed Consent*, 9 ARCHIVES FAM. MED. 126, 127–29 (2000).

75. See Will, *supra* note 17, at 596–97.

76. Walter L. Larimore, *Growing Debate About the Abortifacient Effect of the Birth Control Pill and the Principle of the Double Effect*, ETERNAL PERSP. MINISTRIES (Oct. 1, 2004), <http://www.epm.org/resources/2004/Oct/01/growing-debate-about-abortifacient-effect-birth-co> [https://perma.cc/Y2GK-H58V].

77. Walter L. Larimore, *The Potential Postfertilization Effect with Use of the IUD*, 60 AM. FAM. PHYSICIAN 761, 762 (1999).

78. See *New Poll Reveals Real Reason Behind Mississippi Personhood Loss*, CHRISTIAN NEWSWIRE (Nov. 22, 2011), <http://www.christiannewswire.com/news/3290818327.html> [https://perma.cc/J6G3-K8LF].

births.<sup>79</sup> Those in favor of the bill saw it as an opportunity to further reduce the incidence of unintended pregnancies and thus the number of attendant abortions.<sup>80</sup> Others, however, argued that the use of an IUD might lead to the unacceptable death of a person.<sup>81</sup> Even in the face of such friction and failure, personhood proponents remain undeterred. As mentioned, nearly a dozen states are currently considering state-level personhood measures.<sup>82</sup> But all is not well within the movement.

#### IV. THE FUTURE OF THE PERSONHOOD MOVEMENT: NOVEL IF UNCERTAIN DIRECTIONS

By some accounts, the modern American personhood movement is fractured.<sup>83</sup> Personhood USA, led by Keith Mason, is intent on maintaining a focus at the state level. In contrast, the recently splintered National Personhood Alliance, led by Daniel Becker, well known for his opposition to any abortions, even in the context of rape and incest,<sup>84</sup> proposes to shift its efforts to local municipalities.<sup>85</sup> In general, greater emphasis will be placed on areas (particularly rural) that are predictably and consistently ideologically homogenous in their views against abortion.<sup>86</sup> Local ordinances rather than state-wide initiatives may thus be the next battlefield. In this context, it is the hope and expectation of the National Personhood Alliance that local personhood ordinances will ultimately trigger a legal battle worthy of revisiting abortion jurisprudence at the Supreme Court level.<sup>87</sup> Only time will tell whether these new strategies will change the fortunes of the personhood movement, but the movement itself is unlikely to go away.

In the wake of *Whole Woman's Health*, abortion opponents must rethink their strategy.<sup>88</sup> Restrictions on abortion tethered only loosely to claims about protecting women's health will be struck down easily. A personhood amendment, on the other hand, could survive initial scrutiny if viewed primarily as a policy statement regarding the value of human life. This is exactly what happened when Missouri

79. See Sabrina Tavernise, *Colorado's Effort Against Teen Pregnancies Is a Startling Success*, N.Y. TIMES (July 5, 2015), <http://www.nytimes.com/2015/07/06/science/colorados-push-against-teen-pregnancies-is-a-startling-success.html> [https://perma.cc/ZD2M-2E7T]; Megan Verlee, *Colorado Debates Whether IUDs Are Contraception or Abortion*, NEW ENG. PUB. RADIO (Mar. 5, 2015), <http://digital.nepr.net/news/2015/03/05/colorado-debates-whether-iuds-are-contraception-or-abortion> [https://perma.cc/3MSA-AZAX].

80. See Verlee, *supra* note 79.

81. *Id.*

82. See *supra* notes 5–14.

83. See Blue, *supra* note 54.

84. See Miranda Blue, *Rape Exception in Abortion Ban Divides Anti-Choice Movement*, RIGHT WING WATCH (May 13, 2015, 2:19 PM), <http://www.rightwingwatch.org/post/rape-exception-in-abortion-ban-divides-anti-choice-movement> [https://perma.cc/5WW6-ANCZ].

85. See Blue, *supra* note 54.

86. See *id.*

87. *Id.*

88. Mary Ziegler, *Where the Pro-Life Movement Goes Next*, N.Y. TIMES (July 2, 2016), <https://www.nytimes.com/2016/07/03/opinion/sunday/where-the-pro-life-movement-goes-next.html> [https://perma.cc/G6WS-TZJN].

included a personhood-like statement in a statutory preamble in the 1980s.<sup>89</sup> The preamble provided that “[t]he life of each human being begins at conception,” but when challenged, the Supreme Court held that the preamble itself had not been used to restrict women’s access to abortion.<sup>90</sup> Personhood amendments viewed to require enabling legislation, as opposed to those considered to be self-executing,<sup>91</sup> could similarly survive as generalized policy statements. When subsequent laws are passed in these jurisdictions, such policy statements could then be used to bolster asserted state interests in protecting preborn lives in the context of abortion, IVF, contraception, and elsewhere. For instance, the majority of states already have fetal homicide laws permitting the death of a fetus to be prosecuted as murder.<sup>92</sup> This does not ensure that laws restricting reproductive rights would survive constitutional scrutiny, but it would further complicate the analysis.

The national attention garnered by the personhood movement over the last nine years highlights dissension within the antiabortion camp and forces the public to view a controversial subject through a lens not focused upon in decades. The new personhood efforts, like those undertaken in the 1970s, refocus attention on the status of the unborn (at all stages of biological development) as opposed to the abortion procedure and those who perform it. Many abortion opponents, be they adopters of the incrementalist strategy or of the more absolutist personhood approach, are unified by the value they purport to assign to the unborn and by the hope that nearly all abortions will one day be outlawed.<sup>93</sup> An interesting question discussed among scholars, but not often in the public domain, is why one would oppose the destruction of the unborn at the postimplantation stage (abortion) as many do, while rejecting the destruction of a “person” at the preimplantation stage.<sup>94</sup>

Of course, reaching any sort of consensus on these issues will require nuanced discussions of the developmental stage at which personhood begins, the reasoning (secular or religious) that underlies such views, and the value of reproductive liberty in its various manifestations. After all, it is not settled scientifically that human life begins at fertilization.<sup>95</sup> If individuality is considered to be necessary for the start of human life, then arguably only potential life exists until the totipotent cells present in the early embryo (which could each develop into a separate human being) differentiate into the cells that will become fetal versus placental

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89. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

90. *Id.* at 501 (quoting MO REV. STAT. § 1.205.1(1) (1986)) (alteration in original).

91. See I. Glenn Cohen & Jonathan F. Will, *Mississippi’s Ambiguous ‘Personhood’ Amendment*, N.Y. TIMES (Oct. 31, 2011), <http://www.nytimes.com/2011/10/31/opinion/mississippi-ambiguous-personhood-amendment.html> [<https://perma.cc/T8PL-YCMJ>].

92. Morrison, *supra* note 19, at 458.

93. See Cohen, *supra* note 25.

94. See Peters, *supra* note 68, at 218; Will, *supra* note 17, at 594–95.

95. See Richard J. Paulson, *The Unscientific Nature of the Concept that “Human Life Begins at Fertilization,” and Why It Matters*, 107 FERTILITY & STERILITY 566 (2017); Peters, *supra* note 68, at 218; Will, *supra* note 17, at 595; Jonathan Will, Eli Y. Adashi & I. Glenn Cohen, *When Potential Does Not Matter: What Developments in Cellular Biology Tell Us About the Concept of Legal Personhood*, 13 AM. J. BIOETHICS 38, 39–40 (2013).

tissue.<sup>96</sup> This differentiation does not occur until after implantation.<sup>97</sup> Taking this approach to when human life begins could support those in favor of broad access to IVF and contraception; however, it also lends support to those who oppose abortion. And even still, some may seek to protect preimplantation embryos solely on the basis of their potential to develop into human beings.<sup>98</sup>

It is already common for personhood rhetoric to be used in proceedings involving the disposition of unused embryos. In a recent Missouri case, the Thomas More Law Center argued that such embryos ought to be considered children, with any disposition determined by what is in the children's best interests.<sup>99</sup> Under such an approach, as is the case in Louisiana,<sup>100</sup> it would seem impermissible to destroy unused embryos or donate them for research; rather, these embryos should be "adopted" by a loving family.<sup>101</sup> While women clearly have a right to avoid gestational parenthood (abortion/contraception), it is far from certain that any such right extends to the avoidance of genetic parenthood (preventing implantation of unused embryos in another willing woman).<sup>102</sup> Laws enacted to protect these embryos may thus survive constitutional scrutiny even without a personhood amendment.

Engaging in these questions introduces fractures in the antiabortion community of exactly the kind that helped defeat the personhood amendments discussed herein. But the fight is far from over. *Whole Woman's Health v. Hellerstedt* will inevitably make it harder for states to enact TRAP laws, which weakens the effectiveness of the incrementalist strategy and perhaps will reinvigorate personhood efforts. Regardless, recent incrementalist statutes have already begun to incorporate personhood themes. State-level laws targeting fetal pain, mandating pre-abortion ultrasounds, or restricting the ability to terminate pregnancies on the basis of disability, gender, or race<sup>103</sup> challenge the public to confront the status of the entity to be terminated.<sup>104</sup> And personhood proponents are finding friends in the Trump administration as well.<sup>105</sup> It remains to be seen what types of rules and regulations will be imposed by HHS in

96. Paulson, *supra* note 95.

97. *Id.*; Peters, *supra* note 68, at 210–18.

98. Will et al., *supra* note 95.

99. Cohen & Adashi, *supra* note 20, at 15.

100. LA. STAT. ANN. §§ 9:129–30 (2008). In Louisiana it is already illegal to intentionally destroy embryos, and any unused embryos are supposed to be made available to other couples utilizing IVF. *Id.*

101. See I. Glenn Cohen, *Religion and Reproductive Technology*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 360, 364–66 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017).

102. I. Glenn Cohen, *The Constitution and the Rights Not To Procreate*, 60 *STAN. L. REV.* 1135, 1167–72 (2008).

103. See *supra* notes 21, 22, 51, 52 and accompanying text.

104. See I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 *J.L. MED. & ETHICS* 235, 240 (2011); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 *MD. L. REV.* 458, 470–72 (2014).

105. Rebecca Robbins, *The Trump Administration Could Boost the 'Personhood' Movement Among Abortion Activists*, *BUS. INSIDER* (Dec. 9, 2016, 8:03 PM), <http://www.businessinsider.com/the-trump-administration-could-boost-the-personhood-movement-among-abortion-activists-2016-12> [https://perma.cc/MC5Q-CJZ7].

connection with the draft Strategic Plan's asserted policy of protecting life from "conception."<sup>106</sup> For their part, personhood proponents are unlikely to bow out until the legal status of the unborn is changed and nearly all procedures that end unborn life are outlawed once and for all.

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106. See *supra* note 2 and accompanying text.