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Perspective

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Personhood and the Three Branches of Government

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In the majority opinion in *Roe v. Wade*, Justice Harry Blackmun wrote that if the notion of fetal personhood were established, the argument for women's choice would collapse, "for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[1] Many abortion opponents have adopted a strategy based on this contention. Collectively, these groups can be considered the "personhood movement."

The current iteration of the personhood movement has several important precursors (see table). At both the state and federal levels and throughout the executive, legislative, and judicial branches, the movement has attempted to achieve legal recognition that the rights of human beings begin at the moment of conception or fertilization. It thus threatens to radically change the practice of assisted reproduction.

At the federal level, this movement has scored some recent rhetorical victories in both the executive and legislative branches. A draft of the Department of Health and Human Services 2018–2022 strategic plan stated that it accomplishes its mission in part by "serving and protecting Americans at every stage of life, beginning at conception."[2] The House version of new tax-reform legislation contained personhood language related to college savings accounts, asserting that "nothing shall prevent an unborn child from being treated as a designated beneficiary." It specified that "the term 'unborn child' means a child in utero . . . [defined as] a member of the species homo sapiens, at any stage of development, who is carried in the womb."[3] Such language was stripped from the Senate version of the bill for procedural reasons, and the law ultimately didn't include it. It's unclear what effect on reproductive rights the language would have had, but it represented a shot across the bow.

At the state level, ballot initiatives proposed by the advocacy group Personhood USA failed in Colorado, North Dakota, and Mississippi, although Mississippi's proposed constitutional amendment defining as a person "every human being from the moment of fertilization, cloning, or the functional equivalent thereof" once seemed to enjoy broad support. Personhood USA also facilitated the introduction of personhood bills in 11 states in 2012, none of which became law.[1]

Selected Precursors to Today's Personhood Initiatives

Year and Legal Development	Description
1986 Minn. Stat. §§ 609.266, 609.2661–609.2665, 609.268(1)	Minnesota becomes the first state to pass a fetal homicide law criminalizing "intentionally causing the death" of an "unborn child," defined as "the unborn offspring of a human being conceived, but not yet born." The majority of states have since adopted similar laws.
1992 *Davis v. Davis*, 842 S.W.2d 588 (1992)	The Tennessee Supreme Court decides *Davis v. Davis*, the first major U.S. decision on an embryo-disposition dispute. The Court writes that "pre-embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." In so doing, it rejects the decision of the trial court in the case that "human life begins at the moment of conception" such that embryos "have a legal right to be born."
1994 *Doe v. Shalala*, 862 F. Supp. 1421 (D. Md. 1994)	A lawsuit is brought on behalf of "Mary Doe…an unnamed baby girl who…is 'a pre-born child in being as a human embryo'" and 20,000 other frozen embryos throughout the United States. The suit was brought against the Secretary of Health and Human Services in an attempt to prevent the issuance of a report by the National Institutes of Health Ethics Advisory Board on ethical issues raised by the use of human embryos in research and attendant guidelines. The district court ultimately held that neither the embryo nor its would-be guardian ad litem had standing to bring the lawsuit. Moreover, the court held that following *Roe v. Wade*, the embryo was not a "person" within the meaning of the Constitution.
2004 Codified at 18 U.S.C. § 1841 et seq.	The federal Unborn Victims of Violence Act goes into effect. The Act provides separate criminal penalties for death or serious injury to a "child in utero" during an attack on a pregnant woman. It defines "unborn child" as "a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."

Equivalent federal legislation sponsored by now-House Speaker Paul Ryan (R-WI) in 2011 didn't come up for a vote, though it may resurface.[1]

Recently, the battlefront has shifted to the judicial branch, with advocates attempting to use embryo-disposition disputes to get the courts to recognize embryos' personhood. Such cases, which have been brought in more than a dozen states (and many other countries), involve disputes over implantation of embryos created for in vitro fertilization (IVF) and cryopreserved for potential later use. The cases follow a pattern: a relationship dissolves, and one partner wants to use the embryos to reproduce, against the other's wishes. These cases pit one party's right to procreate against another's right not to procreate. Courts have taken various approaches, including enforcing agreements made by the parties before IVF, balancing procreative interests, and requiring contemporaneous mutual consent before implantation. The courts have usually favored the party seeking to avoid reproduction, but not always.

Enter the personhood movement. The Thomas More Society describes itself as a not-for-profit national public-interest law firm "dedicated to restoring respect in law for life, family, and religious liberty." In several high-profile cases it has sought to convince the courts that frozen embryos are persons under the law and that the courts should consider their "best interests" when determining who should control their fate. In *McQueen v. Gadberry*, for example, the Society argued before the Missouri Court of Appeals that "because the embryos in this case constitute 'children' within the meaning of Missouri's child-custody statutes, the circuit court erred by failing to allocate their custody based on the best interests of the children (i.e., the embryos)."[1] The Court rejected this argument and sided with the male partner, finding that he had a right not to be a genetic father.[1]

Earlier this year, the Society filed an amicus brief in a Colorado Supreme Court case concerning a dispute over frozen embryos that a woman is seeking to use for reproduction against her former husband's wishes. The Society argued that "the embryos' 'God given' and 'unalienable' right to continued human 'life' enjoyed by 'all men,' as proclaimed in the Declaration of Independence should have been weighed in determining the embryos' fate, along with the parental constitutional right to bear and care for offspring."[4] It also "urge[d] the court to take judicial notice of extant

adjudicative scientific facts establishing that a fully human life begins at fertilization."[4] Neither *Roe v. Wade* nor any other body of law, it argued, "permits the court to terminate a human being without a compelling reason."[4] The court has yet to decide the case.

Most recently, Arizona enacted a law specifying that in such disposition disputes, courts should award the embryo to "the spouse who intends to allow" it to "develop to birth," even if the couple signed an earlier agreement to the contrary. The law is the first of its kind in the United States and is very likely to be subject to constitutional challenge.

In attempting to make headway in each branch of government, the personhood movement is following the playbook of other social movements on both the left (e.g., gay rights) and the right (e.g., gun rights). But there is something particularly worrisome about its campaign in the courts. Although many other social movements required constitutional precedents to be overturned — antisegregationists attacked *Plessy v. Ferguson* to achieve integration and gay-rights advocates attacked *Bowers v. Hardwick* to end the criminalization of gay sex — the use of embryo-disposition cases to attack *Roe v. Wade* and related decisions threatens a basic individual liberty: the right to decide whether or not to have children.

Acceptance of the Thomas More Society's argument would suggest that embryos should not be destroyed (or indefinitely cryopreserved), even when both parties agree to that option. Such a stance might lead to a regime similar to that in Germany, where people may not fertilize more than three eggs in one cycle or more eggs than they plan to have implanted in one cycle.[5] It might also lead to a requirement that unused embryos be made available for "adoption," or to restrictions on donating embryos for research or using preimplantation genetic diagnosis, which carries a risk of embryo loss.

Some people in the pro-life camp might welcome such changes, though others want to end abortion but leave reproductive technologies alone. Voters have thus far rejected ballot initiatives such as "personhood" amendments that would have substantially restricted assisted reproduction. Although the judiciary is not beholden to public opinion or voting on ballot initiatives, embryo-disposition cases seem a poor vehicle for such widespread social change. What's more, these cases present the personhood argument in sheep's clothing. They support women's desire to reproduce in these particular disputes but will otherwise profoundly limit people's reproductive options. Eliminating the ability to dispose of embryos not wanted for reproduction, requiring embryo adoption, or limiting the number of embryos that can be fertilized would exclude many people from undergoing IVF for cost reasons and potentially increase women's health risks and discomfort if multiple egg retrievals are needed. Such policies could also hinder people's ability to donate embryos for research, which inevitably involves destroying the embryos or otherwise rendering them unusable for reproductive purposes.

The personhood movement's decision to shift focus to the judiciary is strategically savvy. Although many states have adopted initiatives aimed at abortion — such as fetal heartbeat laws, 20-week bans, and required disclosures — the movement has largely failed to sway public opinion regarding restrictions on reproductive technologies. This resistance is unsurprising, given that many voters may be friends, siblings, parents, or grandparents of children conceived using these technologies, whereas abortions remain shrouded in secrecy. A judiciary-focused strategy avoids the problems of prevailing public opinion. Whether the Colorado Supreme Court will succumb to this legal strategy remains to be seen.

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