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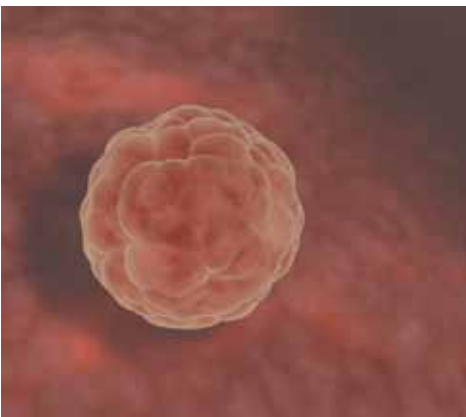
# **The ‘Personhood’ Movement Is Anti-Life**

*Why It Matters that Rights Begin at Birth, Not Conception*

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The Coalition for Secular Government advocates government solely based on secular principles of individual rights. The protection of a person’s basic rights to life, liberty, property, and the pursuit of happiness—including freedom of religion and conscience—requires a strict separation of church and state.

Consequently, we oppose any laws or policies based on religious scripture or dogma, such as restrictions on abortion and government discrimination against homosexuals. We oppose any government promotion of religion, such as “intelligent design” taught in government schools and tax-funded “faith-based initiatives.” We also oppose any special exemptions or privileges granted by government to religious groups, such as exemptions for churches from the tax law applicable to other non-profits.

The Coalition for Secular Government seeks to educate the public about the necessary secular foundation of a free society, particularly the principles of individual rights and separation of church and state.

## Introduction

Amendment 62, set to appear on Colorado’s 2010 ballot, seeks to legally establish personhood from the moment of conception, granting a fertilized egg (or zygote) full legal rights in the state’s constitution. Following in the footsteps of 2008’s Amendment 48, Amendment 62 is the spearhead of a national campaign to outlaw abortion and other practices that could harm a zygote, embryo, or fetus.

If fully implemented, Amendment 62 would profoundly and adversely impact the lives of sexually-active couples, couples seeking children, pregnant women and their partners, doctors, and medical researchers. It would subject them to severe legal restrictions, police controls, and in many cases protracted court battles and criminal punishments.

Amendment 62 would outlaw abortion, even in cases of rape, incest, terminally deformed fetuses, and danger to the woman’s health. It would prohibit doctors from performing abortions except perhaps in some cases to save the life of the woman, thereby endangering the lives and health of many women. In conjunction with existing statutes, Amendment 62 would subject women and their doctors to first-degree murder charges for willfully terminating a pregnancy, with the required punishment of life in prison or the death penalty.

The impact of Amendment 62 would extend far beyond abortion into the personal corners of every couple’s reproductive life. It would outlaw many forms of birth control, including the pill, IUD, and “morning after” drugs. It would require criminal investigation of any miscarriages deemed suspicious. It would ban potentially life-saving embryonic stem-cell research and common fertility treatments.

Amendment 62 rests on the absurd premise that a newly fertilized zygote is a full human person with an absolute right to biological life-support from a woman—regardless of her wishes and whatever the cost to her. The biological facts of pregnancy, in conjunction with an objective theory of rights, support a different view, namely that personhood and rights begin at birth. Colorado law should reflect those facts, not the Bible verses so often quoted (and creatively interpreted) by advocates of Amendment 62 and other “personhood” measures.

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## The ‘Personhood’ Movement

The “personhood” movement is a recent off-shoot of the “pro-life” movement. It is motivated, energetic, and idealistic. To understand its likely impact on American politics and law, we must review its origins and recent political activism.

### “Personhood” and the Abortion Debate

Where does the “personhood” movement fit in the overall debate over abortion? Policy debates over abortion in America often assume just two camps: “pro-choice” on abortion and “pro-life,” or opposed to abortion. In fact, people advocate a variety of views on abortion, depending on their answers to two basic questions: (1) when during pregnancy (if ever) should abortion be legal, and (2) for what reasons?

As we shall see, the advocates of “personhood” are among the most consistent opponents of abortion, explicitly claiming that the zygote is a fully human person with an inalienable right to life. Our view, in contrast, argues for the woman’s right to abortion as absolute throughout pregnancy. Between those two extremes, various “moderate” views can be found.

The fully pro-choice position which we endorse rejects any and all restrictions on abortion as an infringement of the rights of the woman. On this view, abortion should be legal until birth, solely at the discretion of the pregnant woman. Even when a woman deserves blame for acting capriciously in deciding to terminate her pregnancy, she is within her rights to do as she pleases with her own body. Ultimately, that is because neither the embryo nor fetus has any rights. Rights begin at birth, when the fetus becomes an infant, biologically separate from the pregnant woman.

We regard this principled position as the only true “pro-choice” position, because only it fully recognizes and respects a woman’s right to govern her own body as she sees fit. We also regard it as the only truly “pro-life” position, because restrictions and bans on abortion seriously harm and sometimes destroy the lives of actual people.

Many people adopt a moderate “pro-choice” position by accepting restrictions on abortion. Such people might endorse the waiting periods or ultrasounds demanded by opponents of abortion. More commonly, they hold that early-term abortions should be legal, while later-term abortions should be restricted.

The Supreme Court drew such a distinction between early and late term abortions in its decision on *Roe v. Wade*. In 1973, the Court overturned state prohibitions of abortion (as well as possible future federal prohibitions), ruling: “For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.” However, the Court also ruled that states may restrict abortion for the “health of the mother” or “in promoting its interest in the potentiality of human life” in the later stages of pregnancy.<sup>1</sup>

In the past, the Catholic Church accepted a similar compromise position, albeit far more on the anti-

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abortion side. Today, the Vatican emphatically denies that the Church ever morally accepted abortion at any stage, yet it grants that “in the Middle Ages...the opinion was generally held that the spiritual soul was not present until after the first few weeks...”<sup>2</sup> So, as researcher Leslie Reagan states, “Until the mid-nineteenth century, the Catholic Church implicitly accepted early abortions prior to ensoulment.”<sup>3</sup>

Today, the most common moderate “pro-life” or anti-abortion view is that abortions should be permitted in cases of rape and incest, as well as to save the life of the mother. In 2000, Republican presidential contenders George W. Bush and John McCain favored such exceptions for rape and incest.<sup>4</sup> On that view, the embryo or fetus cannot be said to have an inalienable right to life. Instead, the common argument is that a woman must pay the natural price for her decision to engage in consensual sex by

enduring its known consequence: pregnancy. Almost all abortion, on this view, is an evasion of responsibility.

The Catholic Church now advocates the strict “pro-life” view that abortion should be banned, whatever the circumstances. In the 1968 encyclical *Humanae Vitae*, Pope Paul VI condemned “the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons.” The basic rationale was that abortion (and artificial birth control) is contrary to “the order of reality established by God” whereby “each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life.”<sup>5</sup>

The advocates of “personhood” adopt a similar position on abortion: it must be banned whatever the circumstances. However, their view is based on the evangelical strain of Protestantism. As a result, their arguments that abortion is contrary to God’s will are based on (strained) interpretations of Bible passages, rather than appeals to abstract theology.<sup>6</sup> In their secular arguments, the advocates of “personhood” appeal to the fundamentally American notion of an inalienable right to life, claiming that for the embryo and fetus. As a result of those differences, the “personhood” movement does not reject birth control, as does the Catholic Church, provided that it solely acts to prevent fertilization of the egg by sperm.

The basic goal of the “personhood” movement is to “clearly define the pre-born baby as a person” so that embryos and fetuses “will have the same right to life as all Americans do.” It seeks to declare that a zygote is a “human being” and “person” from the moment of conception. “Personhood” advocates reject the claim that “life” or rights begin at “quickening,” when a fetus begins to move in the womb. Instead, they claim that ultrasonography, “DNA testing,” and the “science of fetology...prove... that a fully human and unique individual exists at the moment of fertilization.”<sup>7</sup>

Due to its clear rights-based approach, the “personhood” movement condemns moderate “pro-life” positions in the harshest possible terms. For example, American Right to Life, which proclaims itself as “the personhood wing of the pro-life movement,” condemned John McCain in 2008 as “pro-abortion,” saying he “rejects that an unborn child has the right to life” because, for example, he thinks abortion should be permitted if the “father is a rapist.”<sup>8</sup>

From a more historical perspective, the “personhood” movement is a recent manifestation of the religious right’s response to *Roe v. Wade*. In *Religion In American Politics*,

Frank Lambert suggests that the Moral Majority of the 1970s largely reacted to “the radical politics of the sixties,” including the “‘proabortion’ forces” that prevailed in *Roe v. Wade*. (In fact, support for abortion rights obviously extends far beyond left-wing or “radical” politics). The Moral Majority sought to organize “evangelical leaders [to] boldly engage the culture” and advance the “pro-life” cause as part of their agenda.<sup>9</sup>

The “personhood” movement does not conceal these religious roots. Personhood USA, for example, declares that its “primary mission” is “to serve Jesus by being an Advocate for those who can not speak for themselves, the pre-born child.”<sup>10</sup> The organization is “led by Christian ministers... who are missionaries to preborn children. ... They also lead and participate in peaceful pro-life activism, evangelism, and ministry” at abortion clinics, and they seek to “honor the Lord Jesus Christ” with their work.<sup>11</sup>

In their political activism, “personhood” advocates seek a fundamental change in the law rather than incremental changes, such as banning late-term abortions or imposing waiting periods before a woman may obtain an abortion. In addition to championing total abortion bans, “personhood” advocates explicitly seek to outlaw forms of birth control, fertility treatments, and medical research that may result in the destruction of an embryo. They say they want to protect every zygote from the moment of fertilization—and they mean it.

Since its major efforts began in 2008, the “personhood” movement has emphasized the goal of reversing *Roe v. Wade* as a critical step in imposing abortion bans. A document from Colorado for Equal Rights states, “Why redefine the term person? In the famous *Roe v. Wade* Supreme Court case Justice Blackmun said basically that the whole argument for abortion rights falls apart if we know that the pre-born is a person.”<sup>12</sup> Similarly, LifeSiteNews.com paraphrases then-prominent Colorado anti-abortion activist Kristi Burton: “The time is ripe for a legal challenge to *Roe v. Wade*.”<sup>13</sup> In its 2008 candidate questionnaire, Colorado Right to Life states, “Colorado RTL opposes every law that regulates the killing of unborn children because, regardless of the intention, such laws...will keep abortion legal if *Roe v. Wade* is merely overturned...”<sup>14</sup> In 2009, Gualberto Garcia Jones, more recently a sponsor of Amendment 62, said, “All of our laws that we’re promoting are direct challenges to *Roe v. Wade*.”<sup>15</sup>

By promoting campaigns to legally recognize embryos and fetuses as persons from the moment of fertilization,

the “personhood” movement has sought to change public attitudes about abortion. Personhood USA has taken credit for polling results showing increased support for abortion bans.<sup>16</sup> Indeed, starting in 2009, Gallup polling showed that, for the first time, more Americans called themselves “pro-life” than “pro-choice.”<sup>17</sup> (While we contend the anti-abortion stance is in fact the anti-life one, generally Americans understand that for such polling purposes “pro-life” indicates anti-abortion.) While Personhood USA is partly a result of an increasingly energetic anti-abortion movement, rather than the cause of it, the activities of “personhood” activists probably have helped sway public opinion.

A closer look at the political campaigns waged by the “personhood” movement will better reveal its beliefs and strategies.

### Colorado Campaigns

The “personhood” movement launched its first major initiative in 2008 in Colorado with Amendment 48, which voters defeated in November by a margin of 73 to 27 percent.<sup>18</sup> (The same year, South Dakota voters defeated Measure 11, which sought to ban most abortions through abortion-specific language, and California voters rejected Proposition 4, which sought to institute a waiting period and parental notification requirements prior to obtaining an abortion.<sup>19</sup>)

Despite the pointed defeat of Amendment 48, “personhood” advocates vowed to return in Colorado and expand their cause to other states. They have done that. In a 2009 interview with the *Los Angeles Times*, Keith Mason, a co-founder of Personhood USA, said, “We have big and small efforts going on in 30 states right now...Our goal is to activate the population.” Mason likened his cause to the abolitionist movement to end slavery.<sup>20</sup> Apparently the “personhood” movement seeks to gain support over the long term, even if short-term electoral success proves impossible.

In 2010, Personhood Colorado (a group associated with Personhood USA) gathered sufficient signatures for a new measure, assigned to the Colorado ballot as Amendment 62.<sup>21</sup> Like Amendment 48, the new measure seeks to add a section to Colorado’s Bill of Rights extending full legal rights from the moment of conception. (Gualberto Garcia Jones, along with the vice president of Colorado Right to Life, Leslie Hanks, submitted the paperwork for Amendment 62.<sup>22</sup>)

Amendment 62 states: “Section 32 [of Article II]. Person defined. As used in sections 3, 6, and 25 of Article II of the state constitution, the term ‘person’ shall apply to every human being from the beginning of the biological development of that human being.”<sup>23</sup>

The implications of Amendment 62, then, must be evaluated in light of the other cited sections:

#### Section 3. Inalienable rights.

All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and

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liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

#### Section 6. Equality of justice.

Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

#### Section 25. Due process of law.

No person shall be deprived of life, liberty or property, without due process of law.

Essentially, Amendment 62 would grant the same legal rights to a newly fertilized zygote that a born infant enjoys. The measure would authorize police, prosecutors, judges,

and other officials to intervene to protect embryos and fetuses just as they intervene to protect newborn infants. For example, as columnist Ed Quillen points out, “Every home miscarriage would have to be investigated by the coroner, for it’s his legal duty to look into all deaths of persons that do not occur under medical supervision.”<sup>24</sup> In every other way, an embryo or fetus would receive equivalent legal protection of a newborn.

A primary political strategy of Personhood Colorado has been to garner support among Republicans. In 2008, numerous high-profile Republican office holders and candidates endorsed “personhood”; in 2010 even more did so.

Colorado Right to Life issued similarly-worded candidate surveys in 2008 and 2010. The survey asks (among other things) whether candidates support “the God-given, inalienable Right to Life for the unborn”; “agree that abortion is always wrong, even when the baby’s father is a criminal (i.e. a rapist)”; endorse the “personhood” measure; and oppose “embryonic stem cell research.”<sup>25</sup>

In 2008, those who agreed completely with Colorado Right to Life’s agenda included Congressman Doug Lamborn (elected to the Fifth Congressional district in 2006); Congressman Mike Coffman (elected to the Sixth Congressional district in 2008); Jeff Crank (who lost the primary to Lamborn in 2008 but hosted a radio show and became state director of Americans for Prosperity); and (except for a question about incremental legislation) Kevin Lundberg (appointed to the state senate in 2009 after serving as state representative).<sup>26</sup>

In 2010, Colorado Right to Life proclaimed even greater Republican support for its agenda:

In 2008, most major candidates were unwilling to take a stand on Personhood. It’s possible that Bob Schaffer, the Republican nominee for U.S. Senate, lost because he did not endorse Personhood, and many voters did not consider him sufficiently pro-life. By contrast, in 2010, every credible Republican candidate for top statewide offices has said they support Personhood, and most of the credible Republican candidates for U.S. Senate and Congress have also expressed support for Personhood.<sup>27</sup>

Conservative activist Ed Hanks notes that “three of the seven candidates for districts in Congress are on record as supporting Personhood—Cory Gardner, Doug Lamborn and Mike Coffman.”<sup>28</sup> Colorado Right to Life notes that

Gardner, a candidate in the Fourth Congressional district, joined Lamborn and Coffman in expressing perfect agreement with the organization’s agenda.<sup>29</sup>

In the Republican primaries for governor and U.S. Senate, all four candidates endorsed “personhood,” and the staunchest anti-abortion candidates won. In the governor’s race, Dan Maes beat scandal-plagued Scott McInnis, who had previously served on the advisory board of Republicans for Choice and said he changed his mind on the issue.<sup>30</sup> (However, even though Colorado Right to Life considers Maes to be “100% pro-life,” he also said he supports current laws on birth control and regards Amendment 62 as “simply making a statement.”<sup>31</sup> Maes also selected a running mate who favors legal abortions in cases of rape and incest.<sup>32</sup>) In the Senate race, Ken Buck, who said, “I don’t believe in the exceptions [to abortion bans] of rape or incest,” beat Jane Norton, who favored exceptions for “rape, incest, and life of the mother” (earning her criticism from Colorado Right to Life).<sup>33</sup>

Still, many Colorado Republicans seem confused or conflicted about the implications of “personhood.” At the 2010 Republican state convention, 79 percent supported a resolution holding that “life begins at conception and is deserving of legal protection from conception until natural death.” However, 74 percent also endorsed the statement that “pregnancy, abortion, and birth control are personal private matters not subject to government regulation or interference.”<sup>34</sup> Moreover, some Republicans actively oppose “personhood”; in 2008 former Republican Senator Hank Brown joined the Republican Majority for Choice in opposing Amendment 48.<sup>35</sup> While the “personhood” movement clearly finds strong support among Colorado Republicans and seeks to build that support, many Republicans express concern about the measure’s legal implications or oppose it outright.

Colorado voters will likely reject Amendment 62 in 2010, albeit perhaps by a smaller margin than with Amendment 48 in 2008. However, Personhood Colorado will likely gather enough signatures for a similar measure in 2012.

### **Campaigns in Other States**

From 2008 to 2010, Personhood USA and like-minded groups participated in political campaigns in Georgia, Montana, Mississippi, Alaska, Nevada, North Dakota, and other states. While Personhood USA fell short of “its goal for 2010: Personhood initiatives in all 50 states,” it extended its campaign to far beyond Colorado.<sup>36</sup>

On July 20, 2010, Georgia's Republican voters approved by wide margins "personhood" language similar to that of the Colorado measure, endorsing the position that the "right to life is vested in each human being from their earliest biological beginning until natural death." In only one county did Democratic voters express an opinion on the language, and they approved it as well.<sup>37</sup>

While "legally the outcome of the question bears no weight," Dan Becker, president of Georgia Right to Life, "said he'll use the stats to lobby the Legislature for a proposed constitutional amendment" in 2011, reports the *Atlanta Journal-Constitution*.<sup>38</sup>

The "personhood" language on the primary ballots is part of a broader push for "personhood" in Georgia, as it is in Colorado. As the *Journal-Constitution* reported, the August 10 Republican primary for governor was a "major test of influence for Georgia's most aggressive anti-abortion organization," Georgia Right to Life, which endorsed Nathan Deal over Karen Handel.<sup>39</sup> The organization's political action director, Melanie Crozier, said, "All six of the Republican front-runners for Governor have endorsed a Personhood Amendment to the Georgia Constitution." She continued, "Karen Handel, while not endorsed by GRTL because of her opposition to pro-life positions, still maintains her support of a Personhood Amendment."<sup>40</sup> Handel lost to Deal in a close race.<sup>41</sup> Here, Georgia's "personhood" movement achieved its goal.

Georgia Republicans endorse candidates who advocate abortion bans for federal office too. Becker said, "During the 2008 Presidential primary, Georgia's Republican voters selected the most pro-life candidate in the entire field, Gov. Mike Huckabee." Becker notes that Huckabee "was the only viable candidate that endorsed a Personhood Amendment."<sup>42</sup> Huckabee endorsed Colorado's Amendment 48 in 2008 and campaigned on its behalf.<sup>43</sup>

In Montana, anti-abortion groups failed to collect sufficient signatures to place Constitutional Initiative 102 on the 2010 ballot. In seeking to amend the constitution's provision protecting life, liberty, property, and due process, the language of the measure states, "As used in this section, the word 'person' applies to all human beings, irrespective of age, health, function, physical or mental dependency or method of reproduction, from the beginning of the biological development of that human being."<sup>44</sup>

Annie Bukacek, sponsor of the measure, "vowed that the group will...try again in 2012 and that [it] will start its signature gathering in June 2011," the *Billings Gazette*

reports.<sup>45</sup> A volunteer for the effort said, "The hardworking volunteers see this as a stepping stone to victory in 2011." Cal Zastrow, co-founder of Personhood USA, added, "Jesus Christ is building a movement for personhood rights of babies across the country. He will continue to build in Montana..."<sup>46</sup>

Mississippi Initiative Measure 26 seeks to amend the Bill of Rights (Article III) of the state's constitution by adding the following language as a new section: "As used in this Article III of the state constitution, 'The term "person" or "persons" shall include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."<sup>47</sup>

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The measure "is scheduled [to appear] on the ballot in November 2011," reports the Associated Press. However, the AP notes, Jackson attorney Robert McDuff, in association with Planned Parenthood and the American Civil Liberties Union, filed suit against the measure on July 6, arguing that "the initiative process can't be used to change the state Bill of Rights."<sup>48</sup> On August 12 the anti-abortion Liberty Counsel announced it would "file a motion to intervene" in the suit.<sup>49</sup>

Like the measure in Mississippi, the "personhood" proposal in Alaska remained subject to pending legal action as of mid-2010. In an October 22, 2009, letter, Alaska Lieutenant Governor Craig Campbell certified the application for the "Legal Personhood Initiative."<sup>50</sup> The Lieutenant Governor's web page lists a "petition file deadline" of November 5, 2010.<sup>51</sup>

However, as the lieutenant governor's web page points out, "The Alaska Constitution cannot be altered or amended by initiative."<sup>52</sup> The measure is therefore a proposed "act" stating: "All human beings, from the beginning of their biological development as human organisms, including a single-cell embryo, regardless of age, health, level of functioning, condition of dependency or method of reproduction, shall be recognized as legal persons in the state of Alaska."<sup>53</sup>

In late 2009, the *Anchorage Daily News* summarized the legal challenge to the measure: "The lawsuit argues that Campbell should never have certified the measure. The plaintiffs contend the proposal has far-reaching potential consequences and there is no way voters can know what it might mean for state laws if it passed."<sup>54</sup>

Personhood USA had planned to offer a constitutional amendment on Nevada's 2010 ballot. While the main constitutional language was brief—"the term 'person' applies to every human being"—the measure's "description of effect" contained language comparable to that used in other states and referred explicitly to extending rights to the "unborn."<sup>55</sup>

However, as the *Las Vegas Review-Journal* explains, the proponents of the measure faced a delay in gathering signatures when "Carson City District Judge James T. Russell ruled Jan. 8 that the Personhood petition could not be circulated because its language was so vague that voters would not understand its intentions." Keith Mason (co-founder of Personhood USA) told the newspaper, "We are committed to coming back to Nevada. We are building support for 2012."<sup>56</sup>

In 2009, the North Dakota Senate voted down a "personhood" measure previously approved by the House. However, even the bill's sponsor, Representative Dan Ruby, did not seem to be totally on board with Personhood USA's agenda. He said, in contradiction to the organization's position, that, after fertilization, "when an egg is not implanted [in the uterus]...it's not even alive."<sup>57</sup>

"Personhood" efforts have met with even less success in other states. While Personhood Florida submitted language for the 2010 ballot about "the beginning of biological development," the measure "will not appear on a ballot," Ballotpedia mentions without further elaboration.<sup>58</sup> While a California "personhood" group tried to place the "California Human Rights Amendment" on the 2010 ballot, it "failed to obtain enough signatures to qualify it."<sup>59</sup>

In Missouri, tension arose within the anti-abortion movement over incremental reforms. Working with Personhood USA, Gregory Thompson and others attempted to place a "personhood" measure on the Missouri ballot.<sup>60</sup> What happened instead is that, on July 14, 2010, the governor allowed activation of a new law (Senate Bill 793) strengthening the state's mandatory waiting period and notification laws pertaining to abortion. Abortion providers "will have to supply a state-produced brochure proclaiming: 'The life of each human being begins at conception,'" the Associated Press reports.<sup>61</sup> While Missouri Right to Life praised the passage of the bill, Thompson condemned Missouri Right to Life for embracing "politicians that are 'pro-death, with exceptions.'"<sup>62</sup> In this case, the "personhood" movement seems to have chipped away at abortion rights in Missouri, albeit in ways it does not endorse and without achieving its ultimate goals.

As of the summer of 2010, then, the "personhood" movement has found little success advancing its agenda by law. However, the movement has found strong support in some regions of the country, in certain religious communities, and among segments of the Republican Party. It has mobilized thousands of zealous activists committed to the movement's long-term goals. It has gained experience in effective grass-roots activism. And it has learned to craft its message to gain support and diffuse opposition.

Personhood USA appears eager to continue advancing its agenda in 2011, 2012, and beyond, raising the possibility of success in some states in the future. Even if it fails to ever impose its definition of "personhood" by law, its campaigns may strengthen public opposition to abortion and encourage more incremental restrictions on abortion.

## The Destructive Effects of 'Personhood'

Given that *Roe v. Wade* remains in force, the impact that any state-based personhood measure may have is not clear. However, what is clear is that the ultimate agenda of the "personhood" movement is to overturn *Roe v. Wade* and totally ban abortion and other practices that may harm a zygote, embryo, or fetus.

As we shall see, the battle to fully enforce a "personhood" measure would generate a legal quagmire. To the degree that it were enforced, a "personhood" measure would generate horrific consequences—including harsh criminal penalties—in the areas of abortion, birth control, fertility treatments, and medical research.



### A Legal Quagmire

A state constitutional provision, such as Colorado's Amendment 62, would be implemented and enforced by legislative action, state and federal court rulings, and policies of police and prosecutors. Thus, while Personhood USA and its sympathizers have stated their views of the meaning of "personhood," their proposed legal measures might be interpreted and enforced differently than they would prefer.

The ultimate legal impact of Amendment 62 (and related measures) cannot be perfectly predicted in advance. What is certain is that "personhood" measures would provoke many years of legal battles in legislatures and courts, ensnaring women and their partners and doctors in expensive, time-consuming, and potentially liberty-infringing civil or criminal proceedings. Also certain is that, the more consistently Amendment 62 were interpreted and enforced, the more ghastly its implications would be.

So long as the *Roe v. Wade* decision remains in force, state governments would not be able to impose abortion bans. Therefore, the passage of Amendment 62 in Colorado would not immediately ban abortions due to overriding federal policy. However, as discussed in the prior section, overturning *Roe v. Wade* and outlawing abortion is precisely what the advocates of "personhood" aim to do. That is why religious conservatives express such interest in the abortion-related views of nominated Supreme Court Justices.

Even absent a reversal of *Roe v. Wade*, a "personhood" measure could have far-reaching consequences. As Alaska's Attorney General Daniel Sullivan wrote in a review of the proposed "personhood" measure in that state, courts could apply the measure "on a case by case basis" in an unpredictable number of ways:

An initiative that sought to prohibit all abortions would be clearly unconstitutional because there is controlling law, *Roe v. Wade*, that makes such a measure clearly unconstitutional. But there is no controlling law that makes it clearly unconstitutional to extend legal person status to the point of conception. ...[I]n order to avoid a finding of unconstitutionality, the courts could interpret the personhood measure narrowly with respect to its impact on state laws regulating abortion. ...With respect to other contexts, courts would have to decide on a case by case basis the extent to which extending legal person

status prenatally should expand the scope of an existing law.<sup>63</sup>

Regarding Amendment 62 in Colorado, one possibility would be for the legislature to revise the statutes, and for states and federal courts to "interpret the personhood measure narrowly," in an effort to minimize its impact. Sensing the measure's harmful implications, some legislators and judges might be tempted to wink at the "personhood" language and largely ignore it, but such a practice would spare Colorado residents the worst impacts of the measure only by undermining the rule of law. Moreover, anti-abortion lawyers and activists would surely work doggedly to force the Colorado government to fully implement and enforce the measure.

**The ultimate legal impact of Amendment 62 (and related measures) cannot be perfectly predicted in advance. What is certain is that "personhood" measures would provoke many years of legal battles in legislatures and courts.**

The change in the language of Amendment 62, in comparison to that of Amendment 48, while intended by the measures' sponsors to make the measure even broader, might instead provide legal grounds to interpret it much more narrowly.

Unlike Amendment 48, Amendment 62 does not explicitly mention fertilization as the commencement of personhood and rights. Amendment 48 said, "The terms 'person' or 'persons' shall include any human being from the moment of fertilization."<sup>64</sup> Amendment 62, in contrast, seeks to apply the term "person" to "every human being from the beginning of the biological development of that human being."

Why did Personhood Colorado change the 2010 language from "the moment of fertilization" to "the beginning

of biological development?” The *Denver Daily News* explains: “Co-sponsor of the ballot initiative, Gualberto Garcia Jones, believes it is important to include even asexual forms of human reproduction, such as if science leads to cloning human beings.” Jones told the newspaper, “We would like all human beings, regardless of how they come about, to be covered, because unfortunately there’s the possibility that cloning is going on right now, and we want them to be covered as well.”<sup>65</sup>

Personhood Colorado’s website explains the intended meaning of “the beginning of biological development” in greater detail:

The beginning of the biological development of a human being who is created through sexual reproduction is the instant when the sperm and the ovum touch to form a unique human being. It is different from fertilization or conception in that it accounts for modern forms of asexual reproduction such as cloning. In the case of a cloned human being, his or her biological beginning is when the DNA in the cell/cells is deprogrammed or reprogrammed to the same state of differentiation as a human organism.<sup>66</sup>

However, neither legislators nor courts are bound by the sponsors’ interpretation of the measure’s language, which contains no mention of the sperm touching the ovum. Various voters, lawyers, and judges may argue that a “human being” in the relevant sense means an implanted embryo, an older fetus, or a born infant. By one common-sense reading, Amendment 62 merely states an empty tautology: a human being begins when a human being begins. The ambiguity of the language may induce some to vote for the measure who would not agree with the proponents’ views. The ambiguity could also generate even more future legal battles should the measure pass.

The impact of a “personhood” measure would depend on its interpretation and enforcement by various levels of government. Due to its breadth, it would have sweeping effects on a state’s legal code, such that its implementation could only be haphazard. As a result, many people would be dragged through civil and criminal trials in test cases for seemingly ordinary actions. However, the advocates of “personhood” have for the most part stated their views of the proposed law clearly, and they would fight to implement the law accordingly. And to the degree that “personhood” is enforced, it would create a police-state nightmare for countless women, their partners, and their doctors.

### Harsh Legal Penalties

If passed and enforced, a “personhood” measure would affect the meaning of the criminal law, mandating harsh legal penalties for harm done to zygotes, embryos, and fetuses. Intentionally harming a zygote would be a crime of the same magnitude as harming a born infant, and intentionally killing a zygote would be murder.

Colorado Statute 18-3-102 states, “A person commits the crime of murder in the first degree if...[a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person...Murder in the first degree is a class 1 felony.” Thus, if a zygote is legally a person from the moment of fertilization, then any intentional act of preventing it from implanting (such as by taking the “morning after” pill) or aborting an embryo or fetus would be first-degree murder.

By Colorado law, the punishment for that crime would be life in prison or death. Statute 18-1.4-102 states, “Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment...”

While few supporters of Amendment 62 would likely endorse such draconian punishments, its intended meaning as articulated by its sponsors leaves no room for doubt: any woman who deliberately harms a zygote or who terminates her pregnancy would be guilty of murder under Colorado law. In fact, at least one Colorado religious leader has explicitly called for the death penalty for abortion (among other alleged offenses).<sup>67</sup> While American Right to Life does not directly advocate the death penalty for abortion, it explicitly calls abortion murder and “advocates the death penalty for everyone convicted of a capital crime.”<sup>68</sup>

In addition, coroners, police officers, and prosecutors might be obliged, pressured, or inspired to investigate or prosecute any miscarriage deemed suspicious. A woman suspected of inducing a miscarriage (or attempting to do so) could be subject to criminal prosecution, as could others suspected of helping her in the act.

Similarly, any actions of a pregnant woman that might endanger the welfare of her embryo or fetus could be considered child abuse, which doctors might be required to report. As Indra Lusero and Lynn Paltrow said of Colorado’s Amendment 48, “If the amendment passes, Colorado’s juvenile courts will have jurisdiction whenever

doctors or family members disagree with a pregnant woman's medical decisions."<sup>69</sup>

### **Bans of Elective Abortions**

If fully enforced, Amendment 62 and comparable measures would ban all abortions, except perhaps in cases of extreme risk to the mother's life. As a result, the measure would cause permanent injury or death to some at-risk women, as we shall see. Even in less dire circumstances, the measure would do serious harm to women (and their partners and families) by forcing them to bring any pregnancy to term, regardless of the woman's judgment about her best course in life.

The potential impact of "personhood" measures depends partly on how many women seek abortions. In 2006, there were around 4.3 million births in the U.S.<sup>70</sup> The same year, there were around 846,000 legal abortions.<sup>71</sup> Put another way, there were around five live births for every abortion. The Guttmacher Institute reports for 2005: "In Colorado, 100,500 of the 1,001,833 women of reproductive age became pregnant in 2005. 69% of these pregnancies resulted in live births and 16% in induced abortions."<sup>72</sup> In other words, according to the proponents of Amendment 62, around 16,000 Colorado women committed murder via abortion in 2005. According to the logic and stated intent of the measure, had it been in effect then those women should have been arrested, tried, and punished with life in prison or the death penalty.

Most abortions take place early in a pregnancy. Viability, the age at which a fetus possibly can survive outside the womb with advanced medical assistance, generally is considered to be around 24 weeks at the earliest. In 2006, 62 percent of abortions were performed within the eighth week, and only 1.3 percent of abortions were performed beyond the 21st week.<sup>73</sup> Abortion generally takes place in the first trimester, long before the fetus is viable. By granting zygotes the legal status of persons from the moment of fertilization, Amendment 62 would outlaw abortions even in the earliest stages of pregnancy.

Why do women get abortions? A 2005 article in *Perspectives on Sexual and Reproductive Health* published relevant polling results. Thirteen percent of women cited "Possible problems affecting the health of the fetus." Twelve percent cited "Physical problems with my health." One percent got an abortion because of rape, and fewer than half of a percent got an abortion because of incest. The most popular answer given (where women could list multiple reasons) was, "Having a baby would dramatically change my life," at 74 percent. Many women also offered financial

reasons (73 percent), lack of a partner or problems with a romantic relationship (48 percent), or desire not to have another child (38 percent).<sup>74</sup>

It is clear that most abortions are elective. It is equally clear that, if fully enforced, Amendment 62 (and comparable measures) would totally ban such abortions.

Most Americans support restrictions or bans on elective abortions. Gallup found that, while 19 percent of Americans said that abortion should be "illegal in all circumstances," 54 percent said it should be "legal only under certain circumstances." (Twenty-four percent said it should be "legal under any circumstances.") Older results from Gallup

**If fully enforced, Amendment 62 and comparable measures would ban all abortions, except perhaps in cases of extreme risk to the mother's life. The measure would do serious harm to women by forcing them to bring any pregnancy to term.**

suggest that many Americans favor legal abortion only "when the woman's life is endangered," "when the child would be born with a life-threatening illness," or "when the pregnancy was caused by rape or incest."<sup>75</sup>

However, contrary to that popular opinion, any ban on elective abortions, whether via "personhood" laws or other anti-abortion laws, would have far-reaching and disastrous consequences. (A later section of this paper will address the morality of elective abortions.)

Under a ban of elective abortions, a woman would be legally compelled to add a child to her family, even if she is not physically, emotionally, or financially prepared to raise the child, and regardless of the costs to her, her partner, or any existing children. True, a woman could instead opt to put the child up for adoption, and that is a good option for some. However, that requires months of pregnancy,

delivery of the child, physical recovery, the time and stress of finding a suitable adoptive family, the emotional trauma of giving up a child, lifelong angst about the child's fate, and possible worry about a future reunion. Given these high costs, it is no surprise that many women seek an elective abortion, even when illegal.

If a single state, such as Colorado, banned abortions, women who wanted an abortion would simply travel (or move) to other states to obtain one. However, the aim of "personhood" advocates is to impose universal abortion bans. What then?

Only the naïve imagine that an abortion ban would put an end to elective abortion. Many women would continue to seek abortions through illegal means, either by using legal drugs and herbs to illegally induce an abortion, inflicting physical trauma on themselves to induce an abortion, buying illegal drugs to induce abortion, or turning to underground practitioners of abortion.

Rachel Benson Gold writes for the Guttmacher Institute:

Estimates of the number of illegal abortions in the 1950s and 1960s ranged from 200,000 to 1.2 million per year. ...One stark indication of the prevalence of illegal abortion was the death toll. In 1930, abortion was listed as the official cause of death for almost 2,700 women—nearly one-fifth (18%) of maternal deaths recorded in that year. ...By 1965, the number of deaths due to illegal abortion had fallen to just under 200, but illegal abortion still accounted for 17% of all deaths attributed to pregnancy and childbirth that year. And these are just the number that were officially reported; the actual number was likely much higher.<sup>76</sup>

With the imposition of harsh legal penalties for abortion, women would be less likely to seek professional medical assistance in cases of a "back-alley" abortion gone wrong, leading to more deaths and permanent injury.

The enforcement implications for elective abortion bans are alarming. Under today's laws, police officers routinely pose as prostitutes or drug buyers to "bust" johns and drug dealers. If abortion were outlawed, police officers could also pose as abortion providers in an attempt to ensnare women seeking abortions, then arrest and prosecute them. Or police officers might pose as pregnant women seeking abortions in order to arrest and prosecute doctors providing illegal abortions.

Moreover, women who sought an abortion could, under an enforced "personhood" measure, be arrested under attempted murder or related statutes. If a parent threatened to murder his or her born child, arresting the parent would result in physically separating the parent from the child, thereby keeping the child safe. However, a pregnant woman arrested for attempted murder or menacing could not be physically separated from the embryo or fetus. Instead, any woman seeking to terminate her pregnancy would have to be physically restrained until the fetus was forcibly delivered under state supervision. Thus, the ultimate alternative to legal abortion is police officers strapping an uncooperative woman to her bed for weeks or months and forcing her to give birth—then throwing her in prison for attempted murder.

### **Abortions to Protect a Woman's Health**

Thankfully, modern medicine makes both pregnancy and abortion relatively safe. The Centers for Disease Control reports, "The risk of death from complications of pregnancy has decreased approximately 99% during the twentieth century, from approximately 850 maternal deaths per 100,000 live births in 1900 to 7.5 in 1982. However, since 1982, no further decrease has occurred in maternal mortality in the United States." The report notes that most women who die from pregnancy die during live birth.<sup>77</sup> By way of comparison, the Guttmacher Institute notes, "Fewer than 0.5% of women obtaining abortions experience a complication, and the risk of death associated with abortion is about one-tenth that associated with childbirth."<sup>78</sup>

However, for some small fraction of pregnant women with health problems, getting an abortion is far safer for her than attempting to give birth. The advocates of "personhood" laws claim that they would allow doctors to intervene to save the life of the mother. However, these laws would force doctors to balance the health of the woman with the life of the embryo or fetus, resulting in permanent injury or death for some women who would otherwise choose the relative safety of an abortion.

Personhood Colorado denies that Amendment 62 would "threaten the death penalty on doctors who do legitimate invasive surgery that could unintentionally harm a child in the womb." The organization continues:

In Colorado, the death penalty is only available for first degree murder with aggravating factors. First degree murder requires deliberation and intent. There are no legitimate medical procedures that are intended to kill the child in the womb, and

in those extremely rare situations where a woman needs treatment that might unintentionally result in the death of the child, the doctor would not have acted with intent to kill or even harm the child, but with intent to cure the mother. Before Colorado passed [its] abortion law legalizing abortion in 1967 there were no prosecutions of doctors for legitimate medical treatment. There will be no threat whatsoever to doctors practicing legitimate medicine when the Colorado Personhood Amendment passes. This is a scare tactic. ...

[Amendment 62] won't ban surgeries for women who have tubal pregnancies, also known as ectopic pregnancies.

The crucial issue in criminal law is always intent. Law School 101 teaches you that the basic elements of any crime are a guilty mind (*mens rea*) and a guilty act (*actus reus*). A doctor who performs a procedure to cut out a damaged section of a fallopian tube where a human embryo is lodged is not intending to kill the human embryo, instead she is attempting to cure a physical ailment, and unintentionally causing the death of a human embryo.<sup>79</sup>

Personhood Colorado's claims about the lack of prosecutions under previous anti-abortion laws are meaningless, as those laws were dramatically different from any "personhood" measure.

More importantly, Personhood Colorado ignores the fact that first degree murder is not the only relevant statute. Colorado statute 18-3-105 states, "Any person who causes the death of another person by conduct amounting to criminal negligence commits criminally negligent homicide which is a class 5 felony." Statute 18-1-501(3) clarifies: "A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists." Felony negligence does not require deliberation or intent.

True, a jury might apply the "reasonable person" standard in order to rule that any medical intervention to protect the life or health of the mother constitutes an appropriate "standard of care." Alternately, the legislature might pass statutes clarifying that such medical interventions are legal. However, law enforcers would also be constitutionally bound to grant embryos and fetuses full legal rights,

and they would urge juries to consider the implications of the language of Amendment 62. Even if a criminally prosecuted woman or doctor won in court, just the financial costs and emotional distress of a trial could take a heavy toll.

Moreover, it is not clear that, according to the language of "personhood," a doctor could intervene to save the health (rather than the life) of a woman by terminating a pregnancy. Colorado Right to Life recognizes exceptions only when "the mother's life" is "in danger." And even "under those circumstances, those responsible must make every legitimate effort to save the life of both mother and child."<sup>80</sup> In a separate statement, Colorado Right to Life

**It is not clear that a doctor could intervene to save the health of a woman by terminating a pregnancy. A doctor may be legally required to save the life of the embryo or fetus even if the woman will suffer permanent physical injury.**

recognizes the legitimacy of terminating a pregnancy only "when the mother's life is seriously threatened."<sup>81</sup> Likewise, in a memorandum for the religiously motivated Thomas More Law Center, Robert Muise refers only to terminating a pregnancy to save a woman's life.<sup>82</sup> In other words, a doctor may be legally required to save the life of the embryo or fetus even if the woman will suffer permanent physical injury as a result.

Ultimately, legislation and court cases would determine whether a doctor could terminate a pregnancy to save not only the life but also the health of a woman. However, even if the law were clear, the broader problem is that doctors can rarely predict with certainty when a patient's life or long-term health is at risk. A doctor who terminated a pregnancy, either to save the health or life of a woman, might be second-guessed by a prosecutor. The advice and decisions of doctors would be distorted by fear

of possible prosecution, rather than based solely on their best judgment of the woman's condition and prospects. As an inevitable result, some women would receive sub-standard medical care, and perhaps suffer permanent injury or death.

Abortion bans have produced legal problems and medical horrors even in the seemingly clear-cut case of ectopic pregnancies. Ectopic pregnancies, "the leading cause of pregnancy-related death during the first trimester in the United States," occur when a fertilized egg develops outside of the uterus. An ectopic pregnancy occurs in about two percent of all pregnancies, and in 1992 about half of all ectopic pregnancies (58,200 out of 108,800) resulted in hospitalization.<sup>83</sup> Following a total ban on abortion in Nicaragua, many doctors refused to perform even emergency abortions for ectopic pregnancy, and at least one woman with an ectopic pregnancy died because doctors refused to treat her, apparently out of fear of prosecution.<sup>84</sup>

The lives of American women with ectopic pregnancies likely would be at similar risk under an enforced "personhood" measure. The Ohio-based Association of Pro-life Physicians claims that medical intervention may not be justified even in cases of ectopic pregnancies, because "there are several cases in the medical literature where abdominal ectopic pregnancies have survived," and even in cases of "pregnancies in a fallopian tube... chemical or surgical removal of an ectopic pregnancy is not always necessary to save the mother's life."<sup>85</sup>

Other anti-abortion groups agree that medical intervention may not be warranted even in cases of ectopic pregnancies. The website *Abort73.com* emphasizes that the only relevant consideration is the life, not the health, of the pregnant woman: "making an exception for the life of the mother is by no means comparable to making an exception for the health of the mother." However, the essay continues, "We can never say with certainty that if the pregnancy continues, the mother will die." Regarding ectopic pregnancy, *Abort73.com* states that it might "pose a significant threat to a woman's life during the first trimester." But "there have been a number of documented cases where undiagnosed ectopic pregnancies have yielded successful live births," even after a zygote "implanted in his mother's fallopian tube." The essay concludes on an ambiguous note:

[I]t is safe to say that ectopic pregnancy, even an untreated ectopic pregnancy, is not as life-threatening as most people are led to believe. At

the same time, the risk that an ectopic pregnancy poses to the mother's life is real and sometimes fatal, while the baby's chance of survival is extremely slim. There are no easy answers and no "one-size-fits-all" solution. If you're facing an ectopic pregnancy, make sure you have a pro-life doctor to walk this road with you—one that prescribes abortion as a means of last resort, not as a means of first resort.<sup>86</sup>

Under Amendment 62 and similar measures, how would prosecutors treat doctors who prescribe medical intervention as a "first resort" in cases of ectopic pregnancy to better protect the woman's life and health? The question is impossible to answer in advance—and that uncertainty could impel doctors to refuse to treat women suffering from ectopic pregnancy.

Alternatively, Priests for Life maintains that some kinds of medical interventions, but not others, are justified in cases of ectopic pregnancies. The organization features an exchange with a nurse, who states, "I am an oncology nurse and was asked to give methotrexate for an ectopic pregnancy...I believe the pregnancy was tubal. Needless to say I refused because I was unsure of the morality of it." Priests for Life replies:

The relevant moral question is whether the method or action is in fact a killing of the child. If so, that is a direct abortion, which is never permissible for any reason. ...Sometimes ectopic pregnancies are handled this way, killing the child but leaving the tube intact. Such an action is morally wrong.

However, if what is done is that the damaged portion of the tube is removed because of the threat it poses to the mother, that is not a direct abortion, even if the child dies. What is done is the same thing that would be done if the tube were damaged from some other cause. The mother is not saved by the death of the child but by the removal of the tube. Because the death of the child in this case is a side effect which is not intended, and because the saving of the mother's life is not brought about by the death of the child, such a removal of the damaged portion of the tube is morally permissible.<sup>87</sup>

"Personhood" laws could require doctors to conduct such bizarre theological debates before providing medical care in an emergency. Doctors might be forced to use less

effective or more dangerous methods of treatment. Even doctors who attempted to comply with the law could be subject to criminal investigation and prosecution if they used a method deemed inappropriate by a police officer or prosecutor. Once again, the result could be that doctors refuse to treat women with ectopic pregnancy.

Ectopic pregnancy is not the only serious risk to a woman's life and health in pregnancy: "a variety of medical conditions in pregnant women have the potential to affect health and cause complications that may be life threatening." For example, about one in a thousand women get cancer during pregnancy.<sup>88</sup> To delay treatment until birth would be dangerous if not deadly to the pregnant woman, while to treat the woman while pregnant would be dangerous if not deadly to the embryo or fetus.

Due to its total ban on abortion, Nicaragua recently denied cancer treatment to a ten-weeks pregnant woman with cancer suspected to have spread to her brain, lungs, and breasts.<sup>89</sup> The anti-abortion news service LifeSiteNews.com decried calls to permit her to terminate the pregnancy as unnecessary.<sup>90</sup> Ultimately, the woman was allowed chemotherapy, and as a result, the fetus was stillborn five months later.<sup>91</sup> In this case, as in many others, the life of the woman could only be saved at the expense of that of the embryo or fetus. Yet under "personhood" laws, the embryo or fetus has the same right to life as the woman, so any priority given to her life must be regarded as criminally suspect.

Ultimately, under an enforced "personhood" law, a woman might not be able to obtain an abortion even if she feared for her health or life. Depending on legislative actions and prosecutorial zeal, doctors might not be willing to terminate a pregnancy except in cases of extreme risk to a woman's life. In cases of lesser risk to a woman's health or uncertain risk, doctors likely would be wary about terminating a pregnancy, fearing prosecution. Women might even need to obtain bureaucratic or judicial approval to obtain an abortion, resulting in potentially dangerous delays. The result would be that some women would face increased danger of permanent physical injury or death.

#### **Abortions for Rape, Incest, and Fetal Deformity**

By establishing rights from conception, Amendment 62 and other "personhood" measures would outlaw abortion for pregnancies resulting from rape and incest. Whether the embryo was created in an act of consensual love or brutal force would not impact its legal rights. Without "morning after" medication or abortion to protect themselves from

pregnancy, brutalized girls and women might be forced to endure an inescapable reminder of their attack for nine months thereafter, if not longer. Recall that Colorado Right to Life asked candidates whether they "agree that abortion is always wrong, even when the baby's father is a criminal (a rapist)," and numerous respondents answered yes. While a small fraction of abortions terminate pregnancy resulting from rape or incest, in those few cases this legal implication of "personhood" measures become very important.

Amendment 62 also would outlaw the abortion of severely deformed fetuses without any reasonable hope of a life outside the womb. Although women's bodies usually

**Even doctors who attempted to comply with the law could be subject to criminal investigation and prosecution if they used a method deemed inappropriate by a police officer or prosecutor. The result could be that doctors refuse to treat women with ectopic pregnancy.**

naturally abort in such cases, they do not always do so. A 2008 article in *Boulder Weekly* quotes a doctor from Georgia who discusses the devastating effects on parents if abortion is forbidden in such cases:

There were countless couples who got up and told their story [in a legislative hearing in Georgia] about how they had to have an abortion because of a child that was an[en]cephalic [missing most of the brain] or deformed in some terrible way... [T]o think that you have to carry that child, go through the pain of the delivery process and then watch it die...<sup>92</sup>

Recall that some variants of the "personhood" language would explicitly ban abortion "regardless of...[a fetus's] level of functioning," and clearly that is the intent of every "personhood" measure. Under Amendment 62,

aborting a deformed fetus would be just as much murder as killing a deformed infant. Thus, under “personhood” laws, painful family decisions would become political spectacles for anti-abortion activists under the false banner of “protecting life,” just as happened in the Terri Schiavo case. Leslie Hanks, who helped submit Amendment 62 to the Secretary of State, attempted to “peacefully but physically intervene” in the Schiavo case, and no doubt she would be equally prepared to intervene in the private decisions of Colorado families.<sup>93</sup>

### **Bans of Common Birth Control Methods**

While the most obvious and severe effect of Amendment 62 and comparable measures would be a total ban on abortion, they would also profoundly affect the day-to-day sex lives of couples by restricting birth control. If a newly fertilized zygote is a person with full legal rights, then any action that prevents a zygote from implanting in the uterus must be considered murder. Thus, if fully implemented, “personhood” measures would ban any form of birth control that could prevent implantation of a zygote, most notably, the birth control pill—the most popular type of birth control—as well as intrauterine devices (IUDs) and “morning after” drugs.

A ban on the birth control pill would affect most sexually-active couples. A report from the Centers for Disease Control shows widespread use of birth control, noting that, as of 2008, 99 percent “of all women who had ever had intercourse had ever used at least one contraceptive method,” and 82 percent “had ever used the oral contraceptive pill.” The report continues: “The leading current method of contraception in the United States in 2006–2008 was the oral contraceptive pill. It was currently being used by 10.7 million women aged 15–44 years.”<sup>94</sup>

The reason for the pill’s popularity is not difficult to fathom; it is not only easy to use but also highly reliable. With “perfect use,” the pill is more effective than sterilization and condom use, the second and third most popular forms of birth control; only 0.3 percent of women on the pill experience an unwanted pregnancy within the first year of use, compared to 0.5 percent for sterilization and 2.0 percent for condoms.<sup>95</sup> So women forced to switch from the birth control pill to condom use due to Amendment 62 would, given perfect use, experience around seven times the number of unintended pregnancies. Although effective, sterilization is surgically invasive and permanent, and it exposes women to an increased risk of ectopic pregnancy and other problems.<sup>96</sup> Amendment 62 would require many thousands of women

to scramble to find a new method of birth control, yet none is likely to be as convenient and effective as the pill.

Personhood Colorado endorses laws permitting only birth control “that prevents conception,” understood as “the union of a sperm and an egg.” Forms of birth control that instead result in the destruction of a zygote should be called “abortifacients,” not contraception, the organization holds. “Barrier methods of contraception that prevent the union of the sperm and the egg will not be outlawed,” the group states, and presumably the same logic holds for sterilization, but other forms of birth control would be banned.<sup>97</sup>

How would birth control pills, IUDs, and “morning after” drugs violate “personhood” laws?

While most often the pill acts to prevent fertilization, sometimes it can prevent a zygote from implanting in the uterus. The manufacturers of the popular birth control pills Ortho Tri-Cyclen® and Trinessa® state in their prescription information:

Combination oral contraceptives act by suppression of gonadotropins [hormones]. Although the primary mechanism of this action is inhibition of ovulation, other alterations include changes in the cervical mucus (which increase the difficulty of sperm entry into the uterus) and the endometrium [the lining of the uterus] (which reduce the likelihood of implantation).<sup>98</sup>

Due to this potential for harm to zygotes, the birth control pill used by so many couples would have to be outlawed under “personhood” laws.

The IUD Mirena® also causes “alteration of the endometrium” and may “thin the lining of your uterus,” which may inhibit implantation; moreover, the device may threaten pregnancies that do occur. The device is relatively effective at preventing unwanted pregnancy: “The reported 12-month pregnancy rates were less than or equal to 0.2 per 100 women (0.2%) and the cumulative 5-year pregnancy rate was approximately 0.7 per 100 women (0.7%).” (The device is intended for use for up to five years.) However, if the device fails the consequences can be serious. “Up to half of pregnancies that occur with Mirena in place are ectopic.” Moreover: “Severe infection, miscarriage, premature delivery, and even death can occur with pregnancies that continue with an intrauterine device (IUD). Because of this, your health care provider may try to remove Mirena, even though removing it may cause a miscarriage.”<sup>99</sup>



These facts have two main implications vis-à-vis “personhood” laws. First, because the IUD may prevent a zygote from implanting and may threaten a pregnancy if it does occur, the device should be banned, according to the logic of the measure. (A device that threatened the lives of up to half of all born infants, as the IUD does for zygotes by increasing the risk of ectopic pregnancy, would be banned as a public health menace.) Second, many women already use the IUD, and some might continue to use it (legally or illegally) after passage of a “personhood” law. In such cases, if pregnancy occurred a woman’s doctor would face the threat of criminal prosecution for unduly threatening the life of the embryo. Because a doctor might damage an embryo either by removing the IUD or leaving it in place, some doctors might simply choose not to treat patients with IUDs and save themselves the associated legal risks.

Emergency contraception (or “morning after” drugs) also may prevent implantation of the zygote. The FDA discusses a common brand:

Plan B works like other birth control pills to prevent pregnancy. Plan B acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation).<sup>100</sup>

The FDA approved the new prescription emergency contraception drug “ella” on August 13, 2010. A representative of the drug’s manufacturer said, “We are clearly in the realm of contraception. We’re not in the realm of pregnancy termination.”<sup>101</sup> However, the FDA states, “It is possible that ella may also work by preventing attachment (implantation) to the uterus.”<sup>102</sup> Hence, Gene Rudd, senior vice president of the Christian Medical and Dental Associations, told *American Medical News*, “There will be plenty of doctors who won’t provide the drug because it probably does cause abortion.”<sup>103</sup>

Many religious opponents of abortion welcome the prospect that Amendment 62 and similar measures would ban the birth control pill, IUD, and “morning after” pill. They accept the logical implications of their belief that fertilization creates a human person with full rights, as seen in the following articles. In 2008 the *Wall Street Journal* reported:

The Bush Administration has ignited a furor with a proposed definition of pregnancy that has the

effect of classifying some of the most widely used methods of contraception as abortion.

A draft regulation, still being revised and debated, treats most birth-control pills and intrauterine devices as abortion because they can work by preventing fertilized eggs from implanting in the uterus. The regulation considers that destroying “the life of a human being.” ...

With its expansive definitions, the draft bolsters a key goal of the religious right: to give single-cell fertilized eggs full rights by defining them as legal people—or, as some activists put it, “the tiniest boys and girls.”<sup>104</sup>

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ProLife.com, which advocates “ending abortion,” hosts an article by J. T. Flynn which begins, “Physicians across America—and around the world—are now confirming that the Pill, IUDs, Depo-Provera and Norplant cause early abortions.”<sup>105</sup>

Dr. Walter Larimore considered the “postfertilization effect” of the birth control pill, and he decided on religious grounds to stop prescribing it:

Finally, after many months of debate and prayer, I decided in 1998 to no longer prescribe the Pill. As a family physician, my career has been committed to family care from conception to death. Since the evidence indicated to me that the Pill could have a postfertilization effect, I felt I could no longer, in good conscience, prescribe it...<sup>106</sup>

To put the possible “postfertilization effect” of birth control methods in perspective, consider that natural or spontaneous abortion is a routine occurrence. Many zygotes fail to implant, and they are flushed out of a woman’s body. Due to the difficulty of detecting when a woman’s body rejects a zygote, estimates of prevalence range widely. One researcher summarizes, “In humans, it has been estimated that between 30% and 70% of conceptuses are lost before or at the time of implantation, without women being aware that they were pregnant.”<sup>107</sup> Even after a woman becomes pregnant with the implantation of the embryo, the risks of losing the embryo by natural causes still hover around 10 to 25 percent.<sup>108</sup> Moreover, as William Saletan observes for *Slate*, activities that may inhibit implantation include breast feeding, drinking coffee, and exercising.<sup>109</sup> Hence, nature is by far the greatest cause of death for zygotes and embryos. Yet notice that such natural deaths are not lamented, nor regarded as a public health crisis—not even by those who think of the embryos as persons. In essence, “personhood” measures would ban forms of birth control that mimic the body’s natural processes.

If a newly fertilized zygote is a person, then birth control that blocks implantation even sometimes must be outlawed, with its use and distribution criminally penalized. The same would apply to any medication that might harm a zygote, regardless of the costs in pain and suffering to women. “Personhood” laws would thus profoundly impact the reproductive lives of women even before implantation, the common marker of the beginning of pregnancy.

### **Bans of Common Fertility Treatments**

“Personhood” laws would require dramatic changes to the treatment of embryos in laboratory settings, including fertility clinics and research facilities. Such changes further illustrate the harm Amendment 62 and like measures would inflict on real people as well as the absurdities that arise from granting legal rights to newly fertilized zygotes.

The Division of Reproductive Health of the Centers for Disease Control reports that nationally, “about 12% of women of childbearing age in the United States have used an infertility service.” Fertility treatments account for more than one percent of all U.S. births. In 2007, the 430 fertility clinics evaluated helped women deliver 57,569 infants. Exclusively using in vitro fertilization, the seven clinics in Colorado helped 998 women give birth, led by the Colorado Center for Reproductive Medicine in Englewood with 613 of those births.<sup>110</sup>

Those thousand Colorado mothers would not be mothers, and their children would not exist today, but for fertility treatments. “Personhood” advocates, who claim to “respect life,” would outlaw such births.

Fertility treatments commonly involve the destruction of embryos. The same CDC report explains that, after egg development, the treatment “cycle then progresses to egg retrieval, a surgical procedure in which eggs are collected from a woman’s ovaries. Once retrieved, eggs are combined with sperm in the laboratory. If fertilization is successful, one or more of the resulting embryos are selected for transfer, most often into a woman’s uterus...” The rest of the embryos are frozen or destroyed. Frozen embryos may be saved for later implantation or donation; however, “some embryos do not survive the thawing process.”<sup>111</sup>

The Colorado Center for Reproductive Medicine explains the process of in vitro fertilization:

In cases of normal sperm function, the eggs and several thousand sperm are placed together in a dish which contains a nutrient liquid. These dishes are kept in an incubator overnight and are examined under the microscope on the morning after the egg retrieval to determine which eggs have fertilized normally. ...

Some couples are fortunate enough to collect a large number of embryos from one egg collection. Any remaining viable embryos that are not transferred into the woman’s uterus during the month of treatment may be frozen (“cryopreserved”) in small tubes and kept in storage in the embryo laboratory for future use. Cryopreservation allows the patient to limit the number of embryos transferred “fresh” without discarding the unused embryos that could lead to a future pregnancy. The embryos may be kept in storage for several years. By transferring frozen-thawed embryos into the uterus, some patients have achieved 2–3 pregnancies in different years from just one egg collection.<sup>112</sup>

Notice that freezing embryos is considered to be a desirable part of fertility treatment. If a clinic attempted to fertilize only an egg or two at a time, that would dramatically reduce the effectiveness of the treatment and dramatically increase its cost. Because many eggs don’t fertilize in any given treatment cycle, some women restricted to treatment involving single-egg fertilization would risk waiting too long to get pregnant at all, regardless of the cost.

Alternately, a woman could risk becoming impregnated with several embryos, which could create severe health problems or produce more children than a couple is prepared to raise.

In the context of a “personhood” law, the basic problem with in vitro fertilization is that often not all of the embryos are transferred to the woman’s uterus. Embryos in the lab could not be allowed to perish, nor languish in cold storage, as they would be considered persons with rights, and frozen embryos remain viable only for a few years. To eliminate such practices would render in vitro fertilization not worth doing for most infertile couples. So the practical result of Amendment 62 likely would be to shut down Colorado’s seven reproductive clinics and put an end to those births.

Finally, consider how Amendment 62 would change the legal status of all the frozen embryos now in existence: they would suddenly become “persons” under the law, with all the rights of born infants. Presumably, women would be forced to implant (or donate for implantation) all their existing embryos—or face criminal charges. Moreover, if the biological parents of a frozen embryo die, presumably the embryo has full rights of inheritance, thereby reducing the share of any born children, though how the frozen embryo will grow up to collect remains a problem.

This fantastical scenario highlights the absurdity of treating an embryo as a person in the law. However, the farce of granting legal rights to frozen embryos ought not obscure the much more important point: fertility treatments bestow the gift of a child to many hundreds of Colorado women and men each year, a gift that Amendment 62 would smother.

#### **Bans of Embryonic Stem-Cell Research**

“Personhood” laws would ban all medical research that might harm embryos—even though such research may help save and improve the lives of countless born people. The National Institutes of Health summarizes some of the potential benefits of embryonic stem-cell research:

[S]tudying stem cells will help us to understand how they transform into the dazzling array of specialized cells that make us what we are. Some of the most serious medical conditions, such as cancer and birth defects, are due to problems that occur somewhere in this process. A better understanding of normal cell development will allow us to understand and perhaps correct the errors that cause these medical conditions.

Another potential application of stem cells is making cells and tissues for medical therapies. ...Pluripotent stem cells [from human embryos] offer the possibility of a renewable source of replacement cells and tissues to treat a myriad of diseases, conditions, and disabilities including Parkinson’s disease, amyotrophic lateral sclerosis, spinal cord injury, burns, heart disease, diabetes, and arthritis.<sup>113</sup>

Advances in mid-2010, while still in clinical trials, point to the potential benefits of embryonic stem-cell research—and the hostility such research generates from religious opponents of abortion. Abroad, London’s *Telegraph*

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reports: “Researchers used more than a 100 spare embryos left over from treatment at fertility clinics to establish several embryonic stem cell ‘lines.’ One of those lines... was transformed into blood stem cells before they were converted into red cells containing haemoglobin, the oxygen-carrying pigment.” Such research may lead to safe, abundant blood supplies. A Catholic critic who once ran for office with the ProLife Alliance party condemned the research as “proposed destructive use of embryos.”<sup>114</sup>

In the U.S., *CNN* reports:

The first human clinical trial of a therapy involving embryonic stems cells has been approved [by the FDA] to proceed... The purpose of this first phase of research in humans is to test the safety of a therapy in patients with spinal cord injury.

Candidates for the trial are those with the most severe injuries.<sup>115</sup>

In response to the development, the *National Catholic Register* pointed out that any destruction of an embryo defies official Catholic policy: “The killing of innocent human creatures, even if carried out to help others, constitutes an absolutely unacceptable act.” While the article also discusses potential scientific limitations to the research, it presents a religious position that would oppose embryonic stem-cell research regardless of its effectiveness.<sup>116</sup>

In the name of “respecting life,” “personhood” advocates would impose a death sentence on the real people whose lives might be saved through embryonic stem cell research.

#### **Amendment 62 Is Anti-Life**

Considering the logical implications of Colorado’s Amendment 62 and comparable “personhood” laws, one can only rationally conclude that these proposals are profoundly anti-life, not “pro-life” as its advocates pretend.

To summarize the findings of this section, if fully enforced, Amendment 62 would threaten severe legal penalties, possibly including the death penalty, for intentionally harming a zygote, embryo, or fetus.

It would outlaw all elective abortions, forcing pregnant women to give birth against their judgment of what’s best for their lives, and it would encourage dangerous illegal abortions.

It would outlaw medical intervention that might harm an embryo or fetus except in cases of severe risk to the woman’s life, and even then the measure might strongly discourage doctors from intervening. In cases of risks to a woman’s health only, or in cases of uncertain risk to life, Amendment 62 would threaten a doctor with criminal prosecution for taking action to help a pregnant woman.

Amendment 62 would ban abortion even in cases of rape, incest, and terminal fetal deformity.

It would ban any form of birth control, including the pill and IUD, that might prevent a zygote from implanting in the uterus, thereby forcing couples to resort to less effective forms of birth control and causing more unplanned pregnancies.

It would effectively ban fertility treatments, thereby preventing hundreds of Colorado families from having a child each year.

And it would ban embryonic stem cell research that could save or improve countless lives of actual, born people.

Calling Amendment 62 a “pro-life” measure, when it would actively damage, prevent, or destroy the lives of so many actual people, is an appalling inversion of the truth. Amendment 62 is an anti-life measure that should be morally condemned as such.

## **Individual Rights and Abortion**

As seen in detail in the prior section, if the agenda of the “personhood” movement were adopted and enforced by law, women and men would suffer serious harms, many permanent and some even life-threatening. These dire effects of “personhood” laws are no accident. They are the predictable result of violating the rights of true persons by fabricating rights for embryos and fetuses. Contrary to the assertions of “personhood” advocates, rights begin at birth. Only then does the newly born infant become a distinct human person with a right to life.

These truths about the origin of rights have been obscured by the facile semantic arguments in favor of “personhood,” as well as by the inadequate and misguided arguments of today’s typical defenders of abortion rights. In fact, rights are neither grants from God, nor favors from the Supreme Court. In particular, abortion rights, properly understood, are not based on a woman’s supposed “right to privacy,” nor subject to limitation by “state interests,” as ruled in *Roe v. Wade*. And embryos and fetuses cannot be granted rights based on their potential to develop into human persons. The proper view of rights during pregnancy is based on fundamental facts about human nature. Those facts dictate that only pregnant women—not embryos or fetuses—have rights.

### **The Compromise of *Roe v. Wade***

In *Roe v. Wade*, the court upheld abortion rights based on a “right to privacy” but limited those rights by “state interests.” Of laws that forbid abortion except to save the life of the woman, the court held:

[Such laws] violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman’s qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman’s health and the potentiality of human life, each of which interests grows and

reaches a “compelling” point at various stages of the woman’s approach to term.<sup>117</sup>

In practice, the court ruled that states must leave abortion to “the medical judgment of the pregnant woman’s attending physician” during the first trimester. Thereafter, state interests in the health of the mother and the fetus could override privacy rights. So in the second and third trimesters, states could “regulate the abortion procedure in ways that are reasonably related to maternal health.” Also, when the fetus becomes viable outside the womb, states could “regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother”—due to their “interest in the potentiality of human life.”

The court’s decision was a compromise between “pro-choice” and “pro-life” positions. It permitted abortion, but only under certain conditions and subject to much state regulation. The decision denied the claim that “the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment.” Yet at the same time, it rejected the principle that “the woman’s right is absolute” such that “she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.” It focused on the well-being of the mother, yet sought to protect the viable fetus too. And while the court refused to say that “a new human life is present from the moment of conception,” that was only because it declined to “resolve the difficult question of when life begins.”

The court’s rationale for these compromises was murky, to say the least. The majority opinion asserted an undefined “right to privacy” based on “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.” The opinion declared that right “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” yet did not explain why or how. Moreover, the strength of that right was held to depend on the stage of the pregnancy, for as the fetus develops, “the woman’s privacy is no longer sole,” such that “any right of privacy she possesses must be measured accordingly.” So as the woman’s privacy rights diminish, the state could intervene to promote its significant interests, such as “that of health of the mother or that of potential human life.”

Compared to its appeal to the “penumbras” of the Bill of Rights for a right to privacy, the court was far more clear in its concern for the damage inflicted on women and families by abortion bans:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the

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additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Given the weak ideological defense of abortion rights offered by the court, these policy concerns were likely of paramount concern in the decision. Yet as we shall see, such pragmatic objections to abortion bans cannot justify abortion rights, particularly not in the face of the claim that the embryo or fetus is a person with the same right to life as a born infant.

#### **Today’s “Pro-Choice” Rhetoric**

Today’s most prominent defenders of abortion rights follow in the footsteps of *Roe v. Wade*. By and large, they offer superficial and pragmatic defenses of abortion rights based on vague appeals to privacy, coupled with accounts of the harms inflicted by abortion bans.

The websites of the two most prominent pro-choice advocacy groups in America—Planned Parenthood and NARAL Pro-Choice America—offer no substantive defense of the right to abortion. They simply assert a broadly pro-choice position, without grappling with the difficult moral and legal questions raised by abortion. For example, the website of Planned Parenthood’s “Action Center” offers the following as their sole defense of “abortion access”:

Our primary goal is prevention—reducing the number of unintended pregnancies, especially the alarmingly high number of teenage pregnancies, in the United States. At the same time, to protect their health and the health of their families, women facing an unintended pregnancy must have access to safe, legal abortion services without interference from the government. Decisions about childbearing should be made by a woman in consultation with her family and doctor—not by politicians.<sup>118</sup>

Only a few of the organization’s posted “Research Papers” concern abortion, and those that do focus solely on the history of abortion rights, the safety of abortion, and abortion statistics.<sup>119</sup> Similarly, NARAL’s only substantive document pertaining to abortion rights posted to its website is an eleven-page “fact sheet” on “The Safety of Legal Abortion and the Hazards of Illegal Abortion.”<sup>120</sup>

The failure of these two most prominent pro-choice groups to address the philosophic questions surrounding abortion does not bode well for abortion rights in America, particularly in light of the rise of a fervent “personhood” movement. That’s because neither vague appeals to the privacy rights of pregnant women nor the harms wrought by abortion bans are of any importance if conception creates a person with a right to life. Why not?

First, if embryos and fetuses are persons, then a pregnant woman cannot claim that her decision to terminate her pregnancy should be respected as “private.” She would be obliged to respect the rights of the innocent person within her—and if she failed to do so, the state could and should intervene. To seek an abortion would not be a “private medical decision” but rather akin to hiring a hit man.

Second, if embryos and fetuses are persons, then the pregnant woman would be obliged to endure any financial burdens, health problems, or emotional strain caused by the pregnancy. The right to life of the embryo or fetus would override every such concern, except perhaps the

woman’s own life. To abort an embryo or fetus due to inconvenience or hardship in pregnancy would be just as horrifying as suffocating one’s elderly parents due to difficulties in providing them care.

Third, if embryos and fetuses are persons, then women who suffer terrible complications from illegal abortions have only themselves to blame. To demand legal abortion on that basis would be as bizarre as legalizing assault or rape to prevent perpetrators of those crimes from injuring themselves. The law should protect the victim of the crime (i.e., the embryo or fetus) not the perpetrator (i.e., the pregnant woman).

In sum, the standard pro-choice arguments for abortion rights, drawn from *Roe v. Wade*, cannot withstand the basic claim of “personhood” advocates that fertilization creates a new human person with its own right to life. As Christopher Kurka, the sponsor of the “personhood” initiative in Alaska said, “If...we recognize the unborn as persons, then a woman’s right to choose or a right to privacy doesn’t matter [just like] she doesn’t have a right to kill her child after it’s born.”<sup>121</sup>

The opinion of the Court in *Roe v. Wade* acknowledges its own weakness against “personhood” claims openly: “If this suggestion of personhood is established, the [pro-choice] case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.” The advocates of “personhood” have made much of that concession, citing it frequently as the source of their legal strategy.<sup>122</sup> In light of that, the dependence of pro-choice groups on the precedents set by and arguments of *Roe v. Wade* must be regarded as dangerous. If overturned—or even challenged on its basic assumptions—abortion rights would be left without any defense. That is the result the “personhood” movement strives to accomplish.

Unfortunately, the standard-bearers of the pro-choice movement have not risen to the challenge posed by the “personhood” movement—not even when faced with Colorado’s Amendment 48 in 2008 and Amendment 62 in 2010. Instead, they have declined to state any definite positions on the extent of abortion rights or offer any substantive arguments for such rights.

For example, “Protect Families, Protect Choices,” the major pro-choice coalition against “personhood” measures in Colorado, effectively campaigned against Amendment 48 in 2008 on the basis of its practical consequences. Yet its often-repeated campaign slogans—“It Simply Goes Too

Far” in 2008 and “It Still Goes Too Far” in 2010—cede moral ground to the opponents of abortion. They suggest a compromise, as if some restrictions on abortion might be proper, albeit not the full ban demanded by “personhood” advocates. Perhaps the embryo or fetus should be granted legal rights in the third trimester. Perhaps abortions should be permitted only in cases of rape, incest, deformity, or risk to the life of the woman. Yet surely coalition members like NARAL Pro-Choice Colorado and Planned Parenthood of the Rocky Mountains would oppose any such restrictions on abortion.<sup>123</sup>

Even when directly challenged to state a position on when rights begin in human life, spokespersons for “Protect Families, Protect Choices” skirted the issue. For example, in an online chat for the *Rocky Mountain News*, Crystal Clinkenbeard said:

It is incredibly hard to describe a blanket time when constitutional rights should apply. Reasonable people disagree passionately about when life begins. Amendment 48 does nothing to [resolve] that difficult social issue. Instead, it is more divisive. That kind of decision needs to be left to individuals to follow their own moral, philosophical beliefs.<sup>124</sup>

That answer is not mere evasion. It’s wrong in a deeper way, in that it suggests that abortion rights can be founded on skepticism and relativism.

The most basic function of any government is to protect rights, and that requires constitutional provisions and laws specifying the nature and extent of rights. For the government to adopt a seemingly neutral stance on claims of rights, such that people would have to act based on their own opinions about who has what rights, would be anarchy. In theory, the pro-choice woman would be entitled to terminate her pregnancy, in accordance with her beliefs—just as the anti-abortion activist would be entitled to stop her by force, in accordance with his beliefs. The result would be violent conflict. In practice, however, such neutrality about rights usually amounts to an implicit denial of rights, in that the government would refrain from recognizing or protecting them. Yet the government might attempt to accommodate opposing views—and hence adopt a compromise position—exactly as it did in *Roe v. Wade*. Then, instead of the enjoying the benefit of sound jurisprudence, a society must endure persistent simmering political conflict.

“Pro-choice” advocates may seem to achieve their goals by this approach, because embryos and fetuses are not granted rights. Yet far from securing abortion rights, these skeptical arguments undermine their very foundation. Skepticism is an illusory basis for rights, easily defeated by even barely plausible arguments for “personhood.” Moreover, such skepticism sets a dangerous precedent. Just imagine, for example, the violence that would be unleashed against innocent people if a government allowed people to “follow their own moral, philosophical beliefs” about the rights of women, gays, immigrants, and the elderly on the grounds that their rights constitute a “difficult social issue.”

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The government must take a stand on claims of rights. If embryos and fetuses are persons with rights, the government must actively protect them from harm. Conversely, if no such rights exist, then the government must actively protect women seeking abortions and the doctors who perform them from obstruction and violence by anti-abortion activists. People are only entitled to “follow their own moral, philosophical beliefs” in choosing whether to terminate a pregnancy or bring it to term if embryos and fetuses are not persons with a right to life. Yet that is the very question that these prominent pro-choice activists do not discuss, even when directly challenged by the “personhood” movement.

Ultimately, “personhood” measures are not wrong because they are too extreme, too divisive, or too intrusive—as typical pro-choice activists are wont to claim. Instead, they’re wrong because embryos and fetuses are not human

persons with the right to life. To understand why that's so, we must examine the core arguments for the "personhood" of embryos and fetuses.

### The Core Arguments for "Personhood" Laws

The activist groups seeking to make "personhood" measures the law of the land offer two distinct arguments for granting full legal rights to embryos and fetuses, one religious and one secular. Often first and foremost, they claim that the embryo or fetus is an innocent life recognized and valued as such by God. Hence, abortion is a grave violation of God's prohibition on murder.<sup>125</sup> However, as we argue in a later section, America was founded as a free country, not a theocracy. To force people to obey God's alleged laws is a clear violation of their liberty rights, as well as a violation of the separation of church and state. However, many of these groups offer a secular justification for "personhood" too. They claim that every human has an inalienable right to life, that the humanity of the embryo and fetus is self-evident, and that abortion grossly violates their rights.<sup>126</sup>

What do "personhood" advocates say to justify this claim of self-evident humanity? The argument is stated briefly on the website of Personhood USA as follows:

The science of fetology in 1973 [at the time of *Roe v. Wade*] was not able to prove, as it can now, that a fully human and unique individual exists at the moment of fertilization and continues to grow through various stages of development in a continuum (barring tragedy) until natural death from old age. ...If you look up the word "person" in your average dictionary...you'll find something like this: Person n. A human being. A person, simply put, is a human being. This fact should be enough. The intrinsic humanity of unborn children, by definition, makes them persons and should, therefore, guarantee their protection under the law.

As a result, Personhood USA claims, all "unborn children" should be recognized as possessing "certain rights such as the right to life, liberty and the pursuit of happiness."<sup>127</sup>

More substantive defenses of the view that embryos and fetuses are fully human persons with the right to life are found in sources cited by "personhood" groups, such as the website Abort73.com and the book *Prolife Answers to Prochoice Arguments* by Randy Alcorn.<sup>128</sup> Here, we will outline that argument in its secular form, ignoring appeals to "God-given" rights and Christian scripture.

The argument for the self-evident humanity of the embryo and fetus begins with the scientific claim that the life of a human being begins at conception. Apart from any religious beliefs, it says, the science of medicine overwhelmingly affirms that a new human life is created with the fertilization of the egg by a sperm.<sup>129</sup> That new life is thoroughly human, highly complex, biologically active, and distinct from the pregnant woman. It is neither a blob of tissue, nor just a part of the pregnant woman's own body as are her organs.<sup>130</sup> As Abort73.com says:

At the moment of fertilization, a new and unique human being comes into existence with its own distinct genetic code. Twenty-three chromosomes from the mother and twenty-three chromosomes from the father combine to result in a brand-new and totally unique genetic combination. Whereas the heart, lungs, and hair of a woman all share the same genetic code, her unborn child, from the moment of fertilization, has a *separate* genetic code that is all its own. There is enough information in this tiny zygote to control human growth and development for the rest of its life.<sup>131</sup>

In essence, advocates of "personhood" claim that the fertilization of the egg by the sperm creates a new, distinct, and thoroughly human life, i.e. a human being. The resulting zygote, embryo, and then fetus is not merely a potential human being; it is an actual human being in an early stage of development.<sup>132</sup>

Next, the argument asserts that to be a person—in the sense of possessing the rights to life, liberty, and the pursuit of happiness—requires only that something be a human being. Abort73.com says:

There are essentially two issues which must be resolved concerning unborn embryos and fetuses. The first is, "Are they human beings?" The second is, "Should they be recognized as persons under the law?" We've already established that there is no debate on the first question. ...So should humans be recognized as persons under the law? Yes, because humans are persons. Something is a person if it has a personal nature. In other words, something is a person if, by nature, it has the capacity to develop the ability to think rationally, express emotion, make decisions, etc. This capacity is something that a person has as soon as he begins to exist, since it is part of his nature (in other words, if he exists, he has it). Since humans have a personal nature, humans



are persons. As for the fetus, since it is a human (and so, something with a personal nature), it is a person. Just as a cat qualifies as a feline simply by being a cat, a fetus qualifies as a person simply by being a human. So, it is impossible for a fetus to not be a person.<sup>133</sup>

In other words, the capacity to exist as a person is simply part of human nature. That intrinsic personhood does not depend on any further qualities that might be developed later, such as “size, skill, or degree of intelligence.”<sup>134</sup> In his book *Prolife Answers to Prochoice Arguments*, Randy Alcorn writes:

Age, size, IQ, or stage of development are simply differences in degree, not in kind. Our kind is our humanity. We are people, human beings. We possess certain skills to differing degrees at different stages of development. When we reach maturation there are many different degrees of skills and levels of IQ. But none of these make some people better or more human than others. None make some qualified to live, and others unqualified.<sup>135</sup>

On this view, a person is nothing more or less than a human being: all persons are humans and all humans are persons. Hence, Abort73.com states, “a person...is nothing more or less than a living human. ....The differences that exist between a human being before birth and a human being after birth are differences that don’t matter.”<sup>136</sup>

Finally, the argument claims, the fact that every human life from conception to natural death is a person has profound political and legal implications. “The intrinsic humanity of unborn children qualifies them as persons and should, therefore, guarantee their protection under the law.”<sup>137</sup> More specifically, the embryo and fetus have “the one most fundamental right that no one can live without, the right to life”—just like a born infant.<sup>138</sup> While women have rights to their own bodies, as well as to the lifestyles of their choosing, those rights are not “absolute and unconditional”: they must be limited in pregnancy due to the more fundamental right to life of the embryo or fetus.<sup>139</sup>

Ultimately then, according to “personhood” advocates, a pregnant woman cannot have the right to choose to get an abortion any more than she can properly choose to commit assault, murder, or theft.<sup>140</sup> Since abortion destroys the life of another person, it must be outlawed as a willfully criminal act.<sup>141</sup> To support abortion rights is to

sanction the ongoing genocide against the unborn, with about 50 million dead so far.<sup>142</sup>

Now, with that clear picture of the secular argument for “personhood” firmly in mind, we can take a fresh look at the question of rights in pregnancy.

### **Rights in Pregnancy**

On its surface, the secular argument for “personhood” might seem so simple as to be unassailable. Yet in fact, that simplicity conceals fatal defects in its implicit view of the nature and source of rights. Rights are not inherent in human biology: the right to life is nowhere stamped on our DNA. Rather, rights are principles identifying

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the freedoms of action required for human flourishing in a social context. As we shall see, such rights can and do apply to born infants, but they cannot be legitimately or coherently extended to embryos or fetuses.

The basic biological facts cited in the secular argument for “personhood” laws are not controversial. The fertilization of an egg by a sperm creates a new human life, distinct from that of its genetic parents. By an active, complex, and gradual process of development, that zygote may grow into an embryo and fetus, emerge from the womb as an infant, develop through childhood, mature into an adult, and finally age until death. However, contrary to the argument for “personhood,” that process of biological development does not establish that the zygote, embryo, or fetus is a human person with a right to life. Why not?

“Personhood” advocates assume that each and every human life, whatever its qualities or situation, must be a person too. They offer no argument for or explanation of that view. Yet in fact, the concepts are distinct, such that they need not perfectly coincide. In other words, the concepts of “person” and “rights” may not apply to all forms and stages of human existence. The distinction is simple. The concept of “human life” or “human being” used in the first half of the argument for “personhood” is purely biological. It identifies an organism as part of the human species. The concept of “person” used in the second half of the argument for “personhood” concerns politics. It identifies some entity as entitled to claim rights. To slide between these two distinct concepts using the term “human being”—as “personhood” advocates consistently do—is to commit the fallacy of equivocation.

The scope of the political concept “person” cannot be specified by science. That is a question for philosophy, to be answered based on an objective theory of the nature and source of individual rights. That these biological and political concepts might not coincide perfectly is hardly appalling, as “personhood” advocates suggest.<sup>143</sup> Rather, the very purpose of the political concept “person” is to enable us to specify the scope of rights apart from any rigid biological criteria.

The advocates of “personhood” dogmatically assert that every human life is a person for a very simple reason: their secular defense of “personhood” is mere veneer on a deeply religious worldview whereby rights can only be understood as gifts arbitrarily bestowed by God. By creative and selective readings of their scriptures, combined with distorted appeals to America’s founding principles, the advocates of “personhood” believe that God bestows the right to life at conception. That is why they consider embryos and fetuses persons. However, that is a matter of faith, not rational conviction—and unsurprisingly, the facts show otherwise. Hence, even the secular argument for “personhood” is ultimately religious at its root.

To understand the rights applicable to pregnancy, we must sketch an objective theory of rights. In short, the rights of persons are not gifts from a divine creator, nor found in scripture, as conservatives often imagine. Nor are rights mere entitlements and permissions bestowed and rescinded by majority vote, as modern liberals suppose. Rather, rights are principles identifying our proper freedom of action. And they are rooted in facts about human nature, particularly the conditions for survival and flourishing in society.<sup>144</sup> How so?

Humans cannot survive and flourish by tooth and claw—nor by our feelings, instincts, or faith. We live by exercising our distinctive capacity to reason in order to produce the values required for life—or we perish. That simple fact of human nature is the source of our rights. As Ayn Rand explains:

Since man’s mind is his basic tool of survival, his means of gaining knowledge to guide his actions—the basic condition he requires is the freedom to think and to act according to his rational judgment. . . . If men are to live together in a peaceful, productive, rational society and deal with one another to mutual benefit, they must accept the basic social principle without which no moral or civilized society is possible: the principle of individual rights.<sup>145</sup>

So what are rights? Again, Ayn Rand explains:

A “right” is a moral principle defining and sanctioning a man’s freedom of action in a social context. There is only one fundamental right (all the others are its consequences or corollaries): a man’s right to his own life. Life is a process of self-sustaining and self-generated action; the right to life means the right to engage in self-sustaining and self-generated action—which means: the freedom to take all the actions required by the nature of a rational being for the support, the furtherance, the fulfillment and the enjoyment of his own life. (Such is the meaning of the right to life, liberty and the pursuit of happiness.)<sup>146</sup>

In essence, “to recognize individual rights means to recognize and accept the conditions required by man’s nature for his proper survival.”<sup>147</sup>

On this objective theory of rights, a person’s rights are absolute and inalienable, yet they arise in and pertain to a social context. That’s because individual rights are the most basic principle of justice in a society. They’re neither innate qualities—nor gifts bestowed by divine powers, constitutional tradition, political leaders, or voters. Moreover, genuine rights cannot conflict, nor require the sacrifice of some persons to others. That’s because rights protect each person’s power to pursue his own life and happiness, free of forcible interference from others. Rights are freedoms to action, not entitlements to goods and services provided by others, nor duties imposed on others.

Given this understanding of the nature and source of rights, we can now ask: Is an embryo or fetus a person

with a right to life, like an infant? No. To see why not, we must compare its basic nature and situation as it develops through pregnancy to that of a born infant.<sup>148</sup>

From the moment of fertilization to its implantation in the womb a few days later, the zygote consists of a few largely undifferentiated cells. It is invisible to the naked eye. It has no human organs, and no human form. It has no brain, and so no capacity for awareness or emotions. It is far more similar to a few skin cells than an infant. Moreover, the zygote cannot develop into a baby on its own: its survival beyond a few days requires successful implantation in the lining of the woman's uterus. If it fails to do that, it will be flushed from her body without anyone ever knowing of its existence.

If the embryo matures normally after implanting into the lining of the uterus, it gradually develops primitive organs. Yet its form is not distinctively human in the early stages: it looks very similar to the embryo of other species.<sup>149</sup> As it develops its distinctive human form, the fetus remains wholly dependent on the woman for its survival. Even with the most advanced medical technology, many fetuses born in the 22nd to 25th week of pregnancy will die, and many of those that survive will suffer from "some degree of life long disability, ranging from minor hearing loss to blindness, to cerebral palsy, to profound intellectual disability."<sup>150</sup> So before viability, the fetus is not capable of an existence independent of the pregnant woman.

After 26 weeks, when a fetus would be viable outside the womb, its organs continue to mature in ways critical to its survival and well-being after birth. It is aware, but that awareness is limited to the world inside the womb. Most importantly, however, so long as the fetus remains within the woman, it is wholly dependent on her for its basic life-functions. It goes where she goes, eats what she eats, and breathes what she breathes. It lives as she lives, as an extension of her body. It does not interact with the outside world. It is wholly contained within and dependent on her for its survival. So if the woman dies, the fetus will die too unless delivered quickly. The same is true if the fetus's life-line to her body is disrupted, such as when the umbilical cord forms a tight knot.<sup>151</sup> A fetus cannot act independently to sustain its life, not even on the basic biological level possible to a day-old infant. It is thoroughly and solely dependent on the woman in which it lives.

That situation changes radically at birth. A baby lives his own life, outside his mother. Although still very needy, he maintains his own biological functions. He breathes his own air, digests his own food, and moves on his own.

He interacts with other people as a whole and distinct creature in his own right, not merely as a part of a pregnant woman. He can leave his mother, either temporarily or permanently, to be cared for by someone else.

These important differences between the mode of life of the zygote, embryo, and fetus on the one hand, and the born infant on the other, show that the former cannot be persons. Rights, in other words, cannot be applied until birth. Why not?

First, the utter biological dependence of the zygote, embryo, and fetus on the pregnant woman shows that,

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until birth, it is not yet living its own life, but rather partaking in the life of the woman. It exists as part of the pregnant woman, not as an individual in its own right. Yet rights pertain only to individuals, not parts thereof. Such is the case, even when the fetus would be viable outside the womb. Even then, it is only a potential individual, not an actual one. The fetus only becomes an actual individual when birth separates it from the woman's body. Until then, it cannot be a person with a right to life. The pregnant woman, in contrast, is always an individual with full rights.

Second, the zygote, embryo, or fetus does not exist in a social context until birth. Due to its enclosure within the body of the pregnant woman, the new life cannot interact with other people: it experiences only muffled sounds and indirect pressure through the woman. It cannot be touched or handled, nor can it even engage in the primitive communication possible to infants. Even

the pregnant woman cannot directly interact with her fetus, as she will do with her newborn infant. Until birth, she can only act as a biological host to the life inside her, not as a mother. A woman, in contrast, lives in society whether pregnant or not—and her rights are therefore absolute and inalienable.

Given these facts, to ascribe any rights to the zygote, embryo, or fetus before birth is a profound error. It is not a person—or rather, it is only a potential person, not an actual person. To suppose that mere potentiality is sufficient is to commit the fallacy of the continuum. The fact that a zygote may develop into a born infant does not prove the zygote to be the same thing as a born infant—any more than an acorn is an oak tree and a caterpillar is a butterfly. As philosopher Leonard Peikoff observes, treating a zygote—a potential person—as though it were an actual person makes no more sense than treating an adult human—a potential corpse—as though he were an actual corpse.<sup>152</sup>

The conclusion that rights begin at birth is confirmed by the serious conflict between any rights ascribed to the embryo or fetus before birth with the rights of the pregnant woman.

The pregnant woman's most fundamental right—her right to life—is not merely a bar against murdering her. Her right to life encompasses all the actions that she deems necessary to promote her flourishing and happiness, provided that she does not initiate the use of force against others (and hence violate their rights). Her right to life protects her capacity to act by her own rational judgment, in pursuit of her own self-interest—and such is the very purpose of rights.

The advocates of “personhood” deny the pregnant woman's right to life in asserting rights for the embryo and fetus. *Abort73.com*, for example, frames the issue in terms of competing rights:

Politically speaking, abortion is an issue that involves competing rights. On the one hand, you have the mother's right not to be pregnant. On the other hand, you have the baby's right not to be killed. The question that must be answered is this. Which right is more fundamental? Which right has a greater claim? Abortion advocates argue that outlawing abortion would, in essence, elevate the rights of the unborn over and above those of the mother. “How can you make a fetus more important than a grown woman?”, they might ask.

In reality, outlawing abortion wouldn't be giving unborn children more rights, it would simply gain for them the one most fundamental right that no one can live without, the right to life.<sup>153</sup>

This analysis is utterly wrong. Rights are trumps: they identify the scope and limits of each person's freedom of action in society. To assert conflicts between rights is to confess that one's theory of rights contradicts itself, and a self-contradictory theory of rights cannot be true.

Yet that analysis by *Abort73.com* is correct, in one sense. By the very nature of pregnancy, any rights ascribed to the embryo or fetus would conflict with the rights of the mother to her own body. Since pregnant women are clearly persons with full rights, that fact only confirms that embryos and fetuses are not persons with rights. Moreover, *Abort73.com* acknowledges (to some extent) that pregnant women would be obliged to sacrifice themselves to provide life support to the embryo and fetus: “If a baby is not to be aborted, then the pregnant mother must remain pregnant. This will also require of her sickness, fatigue, reduced mobility, an enlarged body, and a new wardrobe. Fortunately, it is not a permanent condition.”<sup>154</sup> Yet that demand for forced sacrifice contradicts the very nature and purpose of rights. How so?

Rights enable people to flourish by ensuring that they interact by peaceful, voluntary, and mutually beneficial trade—rather than violence, theft, and fraud. In particular, the right to life guarantees one's own freedom of action in pursuit of one's life: it's not a duty imposed on others to preserve one's life. The responsibility of care for another can only be acquired by the voluntary consent of the care-giver, such as when a man takes a friend out to sea on his boat for a week or when parents take an infant home from the hospital rather than abandoning it under a “Safe Haven Law.”<sup>155</sup> However, to grant rights to the embryo and fetus would be to impose such an unjust duty on pregnant women. Regardless of her own plans for her life, every pregnant woman would be obliged to provide life-support to the embryo and fetus, perhaps at great personal cost to herself and her family. That's not freedom; it's slavery.

Significantly, the inalienable right of the pregnant woman to her own life—and hence, her own body—confirms that even a viable fetus cannot be properly regarded as a person with rights. Undoubtedly, for a pregnant woman to seek to abort a healthy, viable fetus without some overriding concern (such as her own health) would be a bizarre and possibly vicious act, e.g., if done to spite

the father or due to evasion of the pregnancy for months. Yet the fact remains that even when a woman is deeply committed to her pregnancy, serious conflicts can arise between her welfare and that of the fetus, such as when receiving emergency medical treatment during childbirth or after a car accident. Due to such cases, the law must reflect the fact that the woman has an absolute right to make her own choices about her body. The potential for such conflicts only ends once the fetus is born, when the woman and baby become—and can be treated as—fully separate individuals.

Of course, when a woman wants to bear a child, she will value her fetus tremendously. She will do all she can to ensure the birth of a healthy baby, protecting it from myriad harms. Moreover, she has every right to expect that the police and courts will protect her and her fetus from criminal assault. Indeed, the law should severely punish criminals who intentionally harm a woman and her fetus. However, the only rational basis for such laws is the woman's rights to her own body—coupled with a recognition of the value she places on her fetus—not any false rights attributed to the fetus. Just as the fetus depends on the woman's body for its survival, so it depends on the woman's rights for its legal protections.

In sum, the fundamental biological differences between a zygote, embryo, or fetus versus an infant show that a woman has every right to terminate an unwanted pregnancy—for any reason. The pregnant woman is a human person with the inalienable rights to life, liberty, and the pursuit of happiness. So is an infant. However, neither a zygote, nor an embryo, nor a fetus is a person. It has no right to life-support from the pregnant woman. For the state to force a woman to provide such life-support under penalty of law would be a gross violation of her rights. Yet that's precisely what "personhood" measures would demand—based on the irrational fantasy that a zygote has the same moral and legal standing as an infant.

## The Morality of Abortion

In addition to the political debates about abortion rights, many people condemn abortion on moral grounds as an evasion of responsibility for the known consequences of sexual intercourse. In fact, however, the termination of a healthy pregnancy can be—and usually is—a morally responsible choice.

Most people do not object to abortions in cases involving rape, incest, deformity, or risk to the woman's life. Yet they question or even condemn abortions obtained

for seemingly less weighty reasons, such as financial hardship, the demands of career or school, problems in the romantic relationship, or not wanting another child. Moreover, when birth control was not used—or used carelessly—people may condemn the abortion as particularly irresponsible. Undoubtedly, these moral objections to abortion stem from implicitly regarding the embryo or fetus as a person, at least in part. People often suppose that the interests of the embryo or fetus should be weighed against the interests of the pregnant woman, such that the termination of a healthy pregnancy cannot

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be morally justified. In the face of these views, we should ask: Is abortion a morally proper choice simply because the pregnancy and resulting child is unwanted? If so, why?

People should not allow themselves to be buffeted through life by accidental circumstances, for to do so is to court disaster and misery. Instead, people ought to consciously direct the course of their lives by their own rational judgment and long-range planning. With respect to procreation, a woman and her partner ought not bear a child just because she happens to become pregnant. Instead, they ought to consider the impact of the pregnancy and resulting child on their health, finances, careers, and overall well-being. They ought to consider whether their relationship is stable enough to withstand the strain of raising a child. They ought to have a child only if they are willing and able to be good parents.

As Ayn Rand wrote in her essay "Of Living Death," in defending the morality of abortion:

The capacity to procreate is merely a potential which man is not obligated to actualize. The choice to have children or not is morally optional. Nature endows man with a variety of potentials—and it is his mind that must decide which capacities he chooses to exercise, according to his own hierarchy of rational goals and values. ...

It is only animals that have to adapt themselves to their physical background and to the biological functions of their bodies. Man adapts his physical background and the use of his biological faculties to himself—to his own needs and values. That is his distinction from all other living species.

To an animal, the rearing of its young is a matter of temporary cycles. To man, it is a lifelong responsibility—a grave responsibility that must not be undertaken causelessly, thoughtlessly, or accidentally.<sup>156</sup>

A couple seeking to live fully rational, purposeful, and hence human lives must decide for themselves whether and when to have children, based on their interests, capacities, and circumstances. To fail to do that—to assume the enormous responsibility of a child simply due to the accident of pregnancy—would be self-destructive. As such, and given that neither the embryo nor the fetus is a person with a right to life, abortion can be a moral choice.

These same basic considerations apply, even when irresponsible sex causes the pregnancy. Unfortunately, such is common. One study found that 46 percent of women who got pregnant unintentionally weren't using any birth control. Among the rest, only 13 percent of birth-control users and 14 percent of condom users reported correct use.<sup>157</sup> The undesirable outcome is not surprising, as the difference in outcomes between “perfect use” and “typical use” of birth-control methods is dramatic.<sup>158</sup>

Couples who cannot be bothered to use birth control or who use it carelessly, then terminate the resulting pregnancy by abortion, deserve some blame. Yet the problem in such cases is not the abortion. If an unwanted pregnancy was caused by irresponsible behavior, then that behavior ought to be morally blamed, not any ensuing abortion. (Similarly, if a skier breaks his leg by skiing too fast in dangerous terrain, we ought to blame him for that skiing, not for his sensible choice to restore his leg to health by surgery.) In the future, the couple ought to resolve to always use birth control properly, in order to avoid the distress, expense, and risks of another

unwanted pregnancy. Yet they should feel no guilt for the abortion, if that best served their interests—but only for engaging in irresponsible sex. Moreover, to the degree that a couple's irresponsible use of birth control indicates habits of irresponsibility, to demand that the couple forego abortion as a matter of moral duty would itself be terribly irresponsible. Such a couple would likely be ill-prepared for the immense burdens of parenthood, and a child should never be inflicted as punishment for the irresponsible decisions of its parents.

Opponents of abortion often present adoption as the moral alternative to abortion for an unwanted pregnancy. Yet adoption is not a viable option for many couples, often for good reasons. To carry any pregnancy to term itself involves some risk, as well as time, effort, and endurance. For some women, that burden might be too great. Moreover, putting up a child for adoption can involve severe and enduring emotional costs, precisely because the born infant to be bestowed on strangers is a person—and one's own child. That is not true of the embryo or fetus destroyed in abortion.

Opponents of abortion also claim that couples can protect themselves against unwanted pregnancy by refraining from sex entirely. However, sex is a magnificent human value integral to any healthy, developed romantic relationship. To advocate this course is to demand that a woman and her partner choose between abstinence and procreation. That is morally wrong: it is not a choice that couples in a modern society should be obliged to make.

In sum, anti-abortion activists often gather support for their cause by associating abortions with promiscuous, irresponsible sex and other self-destructive behaviors. However, women often become pregnant unexpectedly through no fault of their own. In other cases, the error was not the abortion but the irresponsible sex. Whatever the cause of the pregnancy, the embryo or fetus is not a person whose interests must be balanced against those of the woman. So a couple faced with an unintended pregnancy ought to consider the impact of bearing a child on their own lives, as well as the kind of life they could offer that born child. In many cases, abortion might be not just a moral option, but the best one too.

## **‘Personhood’ and the Separation of Church and State**

To the world at large, advocates of “personhood” might seem to be little more than unusually devoted and consistent opponents of abortion. They might seem to be motivated by a commitment to scientific fact and inalienable rights. Yet in fact, they are religious zealots seeking to impose the tenets of their faith by force of law. Consequently, any “personhood” measure, in addition to the other harms they threaten to unleash, would violate the proper separation of church and state.

“Personhood” advocates do not conceal or disguise their religious agenda. They proclaim it, loudly and persistently. Consider a few representative claims.

Kristi Burton, the public face of Amendment 48 in the 2008 campaign, explained her reason for fighting to ban abortion: “It just came to me. I prayed about it and knew God was calling me to do it.”<sup>159</sup>

As noted previously, Personhood USA’s founders proclaim their religious motives:

Personhood U.S.A. is led by Christian ministers Keith Mason and Cal Zastrow...who are missionaries to preborn children. ...They also lead and participate in peaceful pro-life activism, evangelism, and ministry outside of places where preborn babies get murdered [sic]. Personhood USA is committed to...[h]onor[ing] the Lord Jesus Christ with our lives and actions.<sup>160</sup>

In Personhood USA’s “Amendment 62 Campaign Video” for 2010, a spokesman (erroneously) claims that the Declaration of Independence declares that “the rights of the unborn...come from the Creator.” The video follows this statement with a Bible passage purportedly supportive of “personhood.” Personhood USA thanks the “thousands of volunteers and hundreds of churches that made Amendment 62 a reality.” For background music, the video uses the Bluetree song, “God of this City,” which begins, “You’re God of this city, you’re the King of these people, you’re the Lord of this nation.”<sup>161</sup>

Personhood Colorado (while misrepresenting the arguments against “personhood”) tailors its message to the religious:

Now the Church must unite and act boldly for the child in the womb. Amendment 62 needs

men and women of faith to promote the culture of life in our churches by organizing campaigning events and prayer teams.

In 2008, an unprecedented number of churches awoke from their slumber to put the Personhood Amendment on the ballot. This year, we are on the ballot and need to reach out to even more churches so that we may continue to educate and advocate for the preborn child.

Personhood is a Spiritual Battle. The secular world and their false gods have no reason to protect the preborn child. However, with the power of God’s

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promises, and the loving support of His people, all of the lies and scare tactics used by the secular world will be defeated.

God’s word is clear. The only real question is, will we be faithful? ... There are a number of resources available for you to use in your churches. One is a letter by the Alliance Defense Fund, a national Christian law firm, assuring pastors of the legality of working on a constitutional amendment vis-a-vis their non-profit status. ...

The most important aspect of our outreach to the churches is 1) to have God’s people praying for the preborn child and for this campaign, and 2) to have God’s people work to get Amendment 62 [passed].<sup>162</sup>

Colorado Right to Life, whose vice president helped submit Amendment 62 to the Secretary of State, “commits to never compromise on” what it holds to be “God’s law,” which is that “[e]very human being has a God-given right to life from the beginning of that person’s biological development [fertilization] through natural death.”<sup>163</sup> The organization also includes a web page titled “The Bible and Abortion” to highlight the many Biblical passages the organization deems supportive of “personhood.”<sup>164</sup>

The “About” web page for Personhood Florida begins and ends with Bible passages. The organization declares, “As the hands and feet of Christ it is up to us to safeguard this most fundamental of these rights—human personhood.”<sup>165</sup>

Personhood.net, a website of Georgia Right to Life, proclaims four “laws of personhood,” where the first two are explicitly based on God’s will, as revealed through Judeo-Christian scripture:

Law 1: A person is a living physical/spiritual being created in the image of God, male and female, from their earliest biological beginning until natural death.

In a Judeo-Christian worldview the human being as such is afforded a special status and dignity on account of being created in the image of God: “So God created man in His own image, in the image of God He created him; male and female He created them.” (Gn 1:27) ...Because we bear the image of God, all mankind, and, by extension, each and every human life has a “specialness” and worth that demands respect.<sup>166</sup>

And:

Law 2: A person’s right to life is inalienable regardless of age, race, sex, genetic predisposition, condition of dependency or biological development.

Genesis 2:7 (ESV) “...then the Lord God formed the man of dust from the ground and breathed into his nostrils the breath of life, and the man became a living creature.” The right to life is inalienable because it originates with God.<sup>167</sup>

Abort73.com, a website featured prominently by Personhood USA, is a project of Loxafamosity Ministries.<sup>168</sup> “Motivated by our Christian calling,” the organization works to “establish justice” and “expose evil injustices” in accordance with its religious views. The organization’s

seven-point statement of religious faith, which discusses among other things the Christian’s need to evangelize, concludes with a call to recognize the “social implications” of the “announcement of the gospel of Jesus,” which the group holds to include the policy goal of totally banning abortion.<sup>169</sup>

Such proclamations of deeply religious motives are representative of the “personhood” movement and pervasive within it. “Personhood” activists leave no doubt that their political agenda is fundamentally motivated by religious faith. For example, upon turning in signatures for what would become Amendment 62, supporters cheered for Jesus and broke out in the song, “Onward Christian Soldiers.”<sup>170</sup>

Undoubtedly, “personhood” advocates offer a secular argument to supplement their appeals to God’s will—as seen in a prior section. Yet even that argument is fundamentally religious, in that the logical leap from the human biology of the embryo and fetus to its personhood requires an assumption of God’s gift of rights at conception. The secular argument is mere veneer for the thoroughly religious worldview that animates the calls for “personhood.”

In fact, American Right to Life, “The Personhood Wing of the Pro-Life Movement,” explicitly warns against appealing to science rather than focusing on basic religious dogmas:

Don’t make excuses for Planned Parenthood murdering countless children by saying, “Now that we have 4D ultrasound, we know that this is a baby.” Long before ultrasound, the mutilated body of the first aborted child, and the millions since, testified to the wickedness of child killing. 3,500 years ago the Mosaic Law in the Hebrew Scriptures recognized the unborn child as a person...<sup>171</sup>

Evidently, even “personhood” advocates don’t take their own secular arguments very seriously—and no wonder, since they’re so simplistic and fallacious.

In all likelihood, “personhood” advocates resort to secular claims only to appeal to mainstream voters, and perhaps to ward off future legal challenges. In that respect, they resemble the Christians promoting creationism under the pseudo-scientific banner of “intelligent design.”

Ultimately, we should take “personhood” advocates at their word: they seek to impose God’s law on America.



They want to force all Americans, whatever their religious beliefs, to conform to the dictates of their faith. As such, Amendment 62 and other “personhood” measures must be regarded as prime examples of faith-based politics—or worse, outright theocracy. They violate the separation of church and state—and that’s an additional reason to reject them.

Despite the frequent claims from the religious right that America was founded as a “Christian nation,” the U.S. Constitution is a thoroughly secular document, referring to religion only to forbid any mingling of faith and politics. Most importantly, the First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

In his 1802 letter to the Danbury Baptists, Thomas Jefferson expounded the significance of this basic law:

Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State.<sup>172</sup>

What does that analogy of a “wall of separation” imply about the relationship between church and state? As philosopher Onkar Ghate argues, its original and proper meaning is two-fold. First, the state ought not use its powers of coercion to shape people’s religious beliefs or practices, such as by requiring people to accept Islam or attend church. Instead, the state must only consider whether people’s actions, regardless of any religious motivation, violate the rights of others. So the state should intervene to stop men from beating their wives, even if sanctioned by religious scripture. And it should allow people to speak in tongues, even though that is foolish. Second, churches cannot be permitted to harness the power of the state to promote or enforce their preferred religious beliefs and practices, such as if priests acted as television censors or received special tax refunds. Instead, churches must respect the rights of others, using only persuasion to motivate belief.<sup>173</sup>

In essence, a proper government cannot give any more or less weight to certain beliefs just because they are religious

in nature. The government must allow people freedom of conscience—including the freedom to act on their beliefs, however wrong or even absurd—provided that they do not violate the rights of others in the process. Yet the government itself must act solely based on rationally provable facts about man’s nature, including secular principles of individual rights—not based on any claims of religious faith. Such is the true meaning of a separation of church and state.<sup>174</sup>

Despite some secular veneer, “personhood” advocates aim to force Americans to comply with their notion of divine law. As we have seen, they proclaim that purpose, loudly and clearly. As such, they seek to violate every American’s freedom of religion and freedom of conscience.

**Despite the frequent claims from the religious right that America was founded as a “Christian nation,” the U.S. Constitution is a thoroughly secular document, referring to religion only to forbid any mingling of faith and politics.**

Of course, “personhood” activists have every right to attempt to persuade others to follow divine law, as they see it. They have every right to condemn abortion on religious grounds—and attempt to persuade pregnant women not to abort. However, to impose their views by force—whether as vigilantes or political activists—constitutes a grave violation of rights.

In sum, due to their inherently religious motivation and justification, “personhood” measures violate the separation of church and state—and thereby threaten the very foundations of our freedom. A just and proper government must determine the rights involved in pregnancy on the basis of empirical fact, informed by an objective theory of rights. It must recognize and protect the rights of actual persons, not invent rights for merely potential persons. It must uphold the right of the pregnant

woman to terminate her pregnancy at any time, for any reason.

### **Amendment 62 Is Not a ‘Message’**

Ironically, the fact that Amendment 62 is so outrageous in its implications may cause some Colorado voters to not take it seriously. Many voters may be tempted to think: “surely they don’t really want to ban abortions even in cases of rape, incest, deformity, or risks to the health of the mother; surely they don’t really want lengthy prison sentences or even the death penalty for women who get abortions; surely they don’t seriously want to outlaw the birth control pill; surely they don’t want to shut down fertility clinics; surely not.” But the most consistent advocates of Amendment 62 do intend those effects—and they will strive to use “personhood” laws to make them the law of the land.

The religious right typically packages the issue of abortion with a variety of other cultural issues, such as relativism, postmodernism, promiscuous sex, violent video games, and pornography. They claim that voting for “personhood” laws will send the “message” that “all human life has value.”<sup>175</sup> Dan Maes, the Republican candidate for governor of Colorado in 2010, endorsed Amendment 62 but then stated, “People are overestimating the personhood amendment. It simply defines life as beginning at conception. That’s it. Who knows what the intent of it is? They are simply making a statement. That is all I see it as. Do they have another agenda? I don’t know.”<sup>176</sup>

Yet Amendment 62 is not merely a “message” or a “statement.” It does not say, “Resolved: All human life has value.” Nor does it say, “Resolved: Life begins at conception.” (Nobody doubts that a zygote is alive.)

Rather, Amendment 62 is a specific measure with specific, foreseeable political implications. A vote for it is a vote for those sweeping political changes. It is a vote for granting full legal rights to zygotes from the moment of fertilization—at the expense of the real men and women of Colorado.

As this paper has shown, Amendment 62 and comparable proposals would fundamentally change Colorado law. If *Roe v. Wade* were reversed, the consistent enforcement of the measure would outlaw abortion in all cases except perhaps for extreme and immediate risk to the woman’s life, outlaw popular forms of birth control, outlaw all embryonic stem-cell research and the most common in vitro fertilization techniques, and impose severe police and prosecutorial control over the sexual lives of most couples. Not only would it cause some women to suffer and die needlessly, but it would violate the rights of many actual persons and prevent them from making the best choices for their lives.

In its essence, Amendment 62 is profoundly anti-life.

Some who endorse Amendment 62 hope that Colorado voters will overlook the real and frightening implications of the measure, and instead vote based on their disapproval of irresponsible sex and their affection for cuddly babies. Yet in this case, an irresponsible vote would be worse than irresponsible sex. The way to change the culture in the direction of greater responsibility and stronger moral values is not to pass a law that would endanger women, foster a police state, foist parenthood on unwilling couples, and severely violate the rights of millions of actual people.

If you believe that “human life has value,” the only moral choice is to vote against Amendment 62.

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- <sup>170</sup> Peter Marcus, “Personhood Submitted: Thousands of Signatures Submitted, but Will it be Enough?,” *Denver Daily News*, February 15, 2010, <http://www.thedenverdailynews.com/article.php?aID=7303> (accessed August 26, 2010).
- <sup>171</sup> “Personhood Campaign Guidelines,” American Right to Life, <http://americanrtl.org/campaign-guidelines> (emphasis removed; accessed August 29, 2010).
- <sup>172</sup> Thomas Jefferson, “Letter to the Danbury Baptists,” January 1, 1802, republished by Coalition for Secular Government, <http://www.seculargovernment.us/docs/jefferson-danbury.shtml> (accessed August 27, 2010).

<sup>173</sup> Onkar Ghate, “The Separation of Church and State,” recorded lecture by Second Renaissance, 2009, <http://www.aynrandbookstore2.com/prodinfo.asp?number=HG01M> (accessed August 27, 2010).

<sup>174</sup> *Ibid.*

<sup>175</sup> “Colorado Voters to Decide on Pro-Life Amendment,” Focus on the Family Action, August 5, 2008, <http://web.archive.org/web/20080822052447/http://www.citizenlink.org/content/A000007934.cfm> (accessed August 29, 2010).

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