

# Constitutional Personhood of the Unborn Child

*Robert C. Cetrulo*

ABSTRACT: The fatal flaw of *Roe v. Wade*, the 1973 Supreme Court decision legalizing abortion, is that the Court failed to recognize the constitutional personhood of the unborn child within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. The court's majority opinion blatantly ignored the uncontroverted evidence of the personhood of the unborn in medicine, in law, and in literature already extant prior to the adoption of "personhood" protection in the Fourteenth Amendment. Accordingly, from the standpoint of language and logical analysis, the legal separation of "human beings" from "persons" is artificial and arbitrary.

THE THRESHOLD AND FATAL FLAW of *Roe v. Wade*,<sup>1</sup> the 1973 Supreme Court decision legalizing abortion, is that the Court failed to recognize the constitutional personhood of the unborn child within the meaning of clauses within the Fourteenth Amendment to the U.S. Constitution governing due process and equal protection of the law.

Common law has long recognized the primacy of three canons for judicial interpretation of these documents: (1) Words are to be given their "plain meaning." (2) If there exists any ambiguity in the words, we must look to the "original understanding" of their usage at the time when the documentation was drawn. (3) Consideration is to be given to the entire document.

## PLAIN MEANING

Without question the first rule of any intelligent discourse or

---

<sup>1</sup> 93 S.Ct. 705 (1973).

disputation is that one must define one's terms. The art of reasoning unquestionably proceeds from that which is known (conceded by all) to that which is unknown (or disputed) in order to arrive at further knowledge. I would submit that the very process of "thinking" demands "words," for they are the vehicles for expressing our thoughts. As someone once put it, "words are the clothes that ideas wear."

Our opponents would concede that all "persons" are "human beings," but they would deny the reverse of that proposition, namely, that all "human beings" are "persons." Approaching this question from the most neutral starting-point possible, one would be compelled to inquire thus: "What is a human being?" Notice that the focus of this question is the broadest one possible, the neutral and impersonal pronoun "what."

I submit that the most common answer that one could receive to this question—and indeed the most logical answer—would be that a human being is one who is a being (i.e., one who is in existence) and one who is a member of the human species. With this answer the inquiry has logically and inescapably progressed to the personal pronoun "who."

Under this process of analysis, which is certainly neither an *a priori* sort of reasoning from some preconceived conclusion or assumption nor the sort of reasoning that we lawyers call "a leading question" (that is, a question suggesting the desired answer), we nonetheless end up inescapably at the conclusion that the "who" of the human being is a "person." Accordingly, from the standpoint of language and logical analysis, the legal separation of "human being" from "person" is artificial and arbitrary, and certainly not rooted in language, logic, or common understanding, nor in medicine, law, or history, as will be shown below.

St. Thomas More, that great English lawyer and Chancellor of England, was once challenged by his son-in-law Roper concerning the crown-promulgated oath that mandated, under penalty of treason, total recognition of King Henry VIII's re-marriage: "We don't need to know

the wording—we know what it will mean!” More’s incisive response was “It will mean what the words say.”<sup>2</sup>

Since every “person” must first be a “human being,” let us explore the humanity and the individuality of the unborn child in science, law, and history.

(1) “Biologically, at no stage can we subscribe to the view that the foetus is a mere appendage of the mother. Genetically, mother and baby are separate individuals from conception.”<sup>3</sup>

(2) “It is scientifically correct to say that an individual human life begins at conception, when the egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life. There is not one medical text in use in one medical school in this country that teaches to the contrary.”<sup>4</sup>

(3) “Life has a very, very long history, but each individual has a very neat beginning, the moment of its conception.”<sup>5</sup>

(4) “The work of Edwards and his associates in England with test-tube babies has repeatedly proved that human life begins when, after the ovum is fertilized, the new combined cell mass begins to divide.”<sup>6</sup>

(5) “Human” carries the dictionary definition of “belonging to or relating to man....”<sup>7</sup>

#### CAN A “HUMAN BEING” FAIL TO BE A “PERSON”?

---

<sup>2</sup> Robert Bolt, *A Man for All Seasons* (New York NY: Vintage, 1990).

<sup>3</sup> A. W. Liley, M.D., widely referred to as “the father of fetology.”

<sup>4</sup> Micheline Mathews-Roth, M.D., principal research associate of the Harvard University Medical School.

<sup>5</sup> Jerome Lejeune, M.D., professor of fundamental genetics at the University of Descartes (Paris, France).

<sup>6</sup> Jasper Williams, M.D., past president of the National Medical Association.

<sup>7</sup> *Webster’s Collegiate Dictionary*, 5<sup>th</sup> ed., 1948 (my high school dictionary).

Adolf Hitler apparently thought so, and now, for the first time in American jurisprudence, the *Roe* court sought to teach this gigantic oxymoron.<sup>8</sup>

Eminent sources from philosophy and common sense have taught to the contrary. The great Roman philosopher, Boethius, some fifteen hundred years ago, defined “person” as “an individual substance of a rational nature,”<sup>9</sup> and the twentieth-century children’s writer, Dr. Seuss, reminded us that “a person’s a person, no matter how small.”<sup>10</sup>

Contrary to Mr. Justice Blackmun’s assertion in *Roe* that “the unborn have never been recognized in the law as persons in the whole sense,” there is a wealth of legal authority to the contrary, both predating and postdating *Roe*. The leading U.S. legal encyclopedia, for instance, states:

Biologically speaking, the life of a human being begins at the moment of conception in the mother’s womb, and *as a general rule of construction in the law, a legal personality is imputed to an unborn child for all purposes which would be beneficial to the infant after its birth....* A child unborn at the time of the death of its parent has also been considered a “child” of the decedent in determining beneficiaries of an award in a wrongful death action or in a workman’s compensation case.<sup>11</sup>

A quick overview of the law regarding the personhood of the unborn child can be seen in the authoritative legal work on torts (civil wrongs):

Medical authority has long recognized that an unborn child is in existence from the moment of conception.... All writers who have discussed the problem have joined in

---

<sup>8</sup> The U.S. Supreme Court decision *Dred Scott v. Sanford* (1857) regarded slavery is not applicable here since it pre-dated the document under consideration in this paper, the Fourteenth Amendment to the U.S. Constitution, which was not ratified until 1871.

<sup>9</sup> Boethius, *De duabus naturis*, sec. 3.

<sup>10</sup> *Horton Hears a Who* (New York NY: Random House, 1954).

<sup>11</sup> 42 Am. Jur. 2d, “Infants,” sec. 2.

condemning the total no-duty rule and *agree that the unborn child in the path of an automobile is as much a person in the street as its mother*, and should be equally protected under the law.... *Most courts have allowed recovery, even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick*. Viability, of course, does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the state of development.<sup>12</sup>

Kentucky joined this progressive majority in 1955, when I was a freshman in law school: "The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word 'person' is because, biologically speaking, such a child is, in fact, *a presently existing person*, a living human being."<sup>13</sup> In 1974 the Michigan Supreme Court rejected the "live birth" requirement and upheld the "personhood" of the unborn child:

If the mother can die and the fetus live, or the fetus die and the mother live, how can it be said that there is only one life? ...The phenomenon of birth is not the beginning of life; it is merely a change in the form of life. The principal feature of that change is the fact of respiration.... A baby fully born and conceded by all to be "alive" is no more able to survive unaided than the infant *en ventre sa mere*. In fact, the babe in arms is less self-sufficient—more dependent—than his unborn counterpart.... The fact of life is not to be denied. Neither is the wisdom of the public policy which regards *unborn persons* as being entitled to the protection of law.<sup>14</sup>

According to Professor Prosser, the viability requirement is being rejected overwhelmingly.<sup>15</sup> In Texas, for instance, recovery was

---

<sup>12</sup> *Prosser and Keaton on Torts*, 2<sup>nd</sup> ed., sec. 36 (1955).

<sup>13</sup> *Mitchell v. Couch*, 285 S.W.2d 901 (1955). A subsequent case in point was successfully practiced by the author. *Cooper v. Cox*, KY, 510 S.W.2d 530 (1974).

<sup>14</sup> *O'Neill v. Morse*, 188 N.W.2d 785 (Mich., 1971).

<sup>15</sup> *Prosser and Keaton on Torts*, 5<sup>th</sup> ed., sec. 55, 1984.

permitted to a two-and-a-half month old unborn child.<sup>16</sup>

The unborn child is entitled to social security benefits for the death of the father that preceded the birth of the child: “Medically speaking, Donna was viable from the instant of conception onward.”<sup>17</sup>

The New Jersey Supreme Court, already in 1964, not only recognized the personhood of an unborn child but held that his right to life prevailed over constitutionally protected religious beliefs of his mother, a Jehovah’s Witness who rejected a blood transfusion necessary to preserve her life (and, of course, his as well): “We are satisfied that the unborn child is entitled to the law’s protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.”<sup>18</sup>

A very interesting pre-*Roe* decision, totally ignored by Justice Blackmun in *Roe*, rejected the attack by pro-abortionists on the constitutionality of Ohio’s restrictive abortion law. The three-judge federal court not only upheld the Ohio restrictive abortion statute but pointed out that, independent of the statute, it was the duty of the law to protect the right to life of unborn children: “Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.”<sup>19</sup>

Even the United Nations has recognized pre-natal rights: “The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as*

---

<sup>16</sup> *Delgado v. Yandel*, 468 S.W.2d 475 (Tex.Civ.App.).

<sup>17</sup> *Wagner v. Finch*, 413 F.2d 267 (C.A. 5, 1969).

<sup>18</sup> *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

<sup>19</sup> *Steinberg v. Brown*, 321 F.Supp. 741 (D.C. Ohio, 1970).

*well as after birth.*<sup>20</sup>

Non-citizen aliens have been afforded the protection of the due process and equal protection of the law clauses of the U.S. Constitution: “The term ‘person,’ used in the Fifth Amendment, is broad enough to include *any and every human being*.”<sup>21</sup> The same constitutional rights of personhood under the Fourteenth Amendment were afforded by the Supreme Court to fleshless corporations, again long before *Roe*.<sup>22</sup>

#### ORIGINAL UNDERSTANDING

Assuming that the word “person” is ambiguous, which we deny, the second rule of document interpretation would come into play, i.e., we must look to the “original understanding” of the usage of the word at the time when the document was drawn. The Fourteenth Amendment was ratified in 1868. As of 1868, what was the state of medical knowledge concerning the unborn child? What was the state of recognition of its legal rights? How was “personhood” used in common parlance, as described in the dictionaries of the day?

The motivation for the passage of the nineteenth-century anti-abortion statutes throughout the United States from 1857 to 1871 was the then-recent realization by the American Medical Association of the discovery of the precise process of fertilization/conception. As a result the AMA passed resolutions condemning abortion as “unwarrantable destruction of human life” and described “the independence and actual existence of the child before birth as a living being.... We had to deal with human life. In a matter of less importance, we could entertain no compromise. An honest judge on the bench would call things by their

---

<sup>20</sup> United Nations Declaration of the Rights of the Child.

<sup>21</sup> *Wong Wing v. United States*, 163 U.S. 228 (1895).

<sup>22</sup> *Santa Clara County v. Southern Pacific R.R.Co.*, 6 S.Ct. 1132 (1886); *Times Mirror Co. v. Superior Court of California*, 314 U.S. 252 (1941).

proper names. We could do no less.”<sup>23</sup>

In the 1828 edition of *Webster's, An American Dictionary of the English Language*, “person” is defined as “an individual human being consisting of body and soul. We apply the word to living beings only, possessed of a rational value; the body when dead is not called a *person*. It is applied alike to man, woman, or child.” The 1865 version of the same dictionary defined “person” as “the corporeal manifestation of a soul; the outward experience, expression, etc., body..., an individual of a human race.” “Human being” is defined by *Webster* in 1828 as “belonging to man or mankind; pertaining or relating to the race of man,” and in the 1865 version “human” is defined as “belonging to man or mankind; having the qualities or attributes of a man; pertaining or relating to the race of man.” “Man” is then defined by *Webster* in 1828 as “mankind; the human race; the whole species of human beings; beings distinguished from all other animals by the powers of reason and speech, as well as by their shape and dignified aspect.” In 1865 *Webster* defined “man” as “an individual of the human race; a human being, *a person*.” It is obvious that all of these definitions show an understanding of the word “person” to include all human beings, with no reference to the incident of birth.

Lest one should argue the narrow Lockean concept of consciousness, speech, etc., as essential, it should be pointed out that this approach would exclude the child two months out of the womb, the retarded or insane adult, the Alzheimer patient, and so on, and would lead to acceptance of the “subhuman” categorization popularized by Adolf Hitler, which should be an embarrassment to anyone attempting to defend it today.

This same inclusive understanding of “person” as including all members of the human race found expression also in the statements of

---

<sup>23</sup> See R. Sauer, “Attitudes to Abortion in America, 1800-1973,” *Populations Study* 28 (1974): 53-59; J. Mohr, *Abortion in America, the Origin and Evolution of National Policy* (New York NY: Oxford Univ. Press, 1978).

the prime sponsor of the Fourteenth Amendment, U.S. Congressman John Bingham of Ohio, who stated that the reach of the Amendment was intended to be “universal” and to apply to “any human being.”<sup>24</sup> Fourteenth Amendment rights were intended not only to “pertain to American citizenship but also to common humanity.”<sup>25</sup>

That the political climate as of 1868 (as manifested by the people’s representatives in the state legislatures) had recognized the unborn child as a human being with legal rights is proven by the fact that as of 1868 “there were at least 36 laws enacted by state or territorial legislatures limiting abortion.”<sup>26</sup>

The argument that not all of these state statutes totally prohibited abortion is evidence of non-personhood seems disingenuous when we consider the reality that the personhood rights conferred under the Fourteenth Amendment do not constitute an absolute right to life. In fact, human life may be taken, with “due process of law,” e.g., in the self-defense situation, or in the case of capital punishment.

Typical of the widespread and common understanding of the nature of the unborn child as a person is the anti-abortion statutory scheme in Kentucky, which provided criminal penalties for the “death of an unborn child” in a procured abortion and imposed yet a separate and additional penalty if the procured abortion results in the death of the mother.<sup>27</sup>

#### CONSIDERATION OF THE ENTIRE DOCUMENT

When one considers the entire Constitution, one finds no express definition of, or limitation on, the concept of “person” such as exists,

---

<sup>24</sup> *Cong. Globe*, 39<sup>th</sup> Congress, First Session 1089 (1866).

<sup>25</sup> *Cong. Globe*, 40<sup>th</sup> Congress, First Session 514 (1868).

<sup>26</sup> Dissenting Opinion of Justice Rehnquist in *Roe v. Wade*, *supra*.

<sup>27</sup> KRS 436.020; KRS 435.040.

for example, regarding citizenship, the right to vote, the age limitations regarding holding of certain offices, and so on, and certainly no limitation upon the “right to life” that is enunciated so strongly in the Declaration of Independence. This point again reinforces the conclusion drawn above, that personhood rights are due to every member of the human race.

#### CONCLUSION

The severance of “human being” from “personhood”—dishonestly constructed by the *Roe* Court—is arbitrary, artificial, unscientific, and contrary to history and to traditional constitutional interpretation. The Court has abolished a right that is “of the very essence of a scheme of ordered liberty, ... a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>28</sup>

It is a strange society that tells us that the Constitution furnishes legal rights to fleshless corporate entities as “persons” within the meaning of the Fourteenth Amendment but denies those same rights to the live beings—species *homo sapiens*—growing in their mother’s wombs.

It is a strange society that says to us that the woman who, on her way to keep a 4 p.m. appointment with her abortionist to kill the unborn child growing in her womb and who suffers a vehicular accident resulting in the injury or death of that child at 3 p.m. may now sue and collect damages for the injury or death of that child.

It is an impotent and clueless society that tells us that the remedy for such atrocity is for the Supreme Court to refer the matter back to the states for their individual decision-making, which would tragically reinforce the hollow and indeed fatal principle that “the State giveth, and the State taketh away”!

Professor Robert M. Byrne published an excellent analysis of *Roe*

---

<sup>28</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

in his “An American Tragedy: The Supreme Court on Abortion”:

Three generations of Americans have witnessed decisions by the U.S. Supreme Court which explicitly degrade fellow human beings to something less in law than “persons in the whole sense.” One generation was present at *Scott v. Sanford* [denying rights to slaves], another at *Buck v. Bell* [denying rights to retarded people], and now a third at *Roe v. Wade* [denying rights to unborn children]. Are not three generations of error enough? ... First, *Dred Scott*, then *Buck v. Bell*, and now the most tragic of them all, *Roe v. Wade*. Three generations of error are three too many, and the last of them shall be called the worst.<sup>29</sup>

Our Court must not only reverse *Roe*, which has resulted thus far in a surgical slaughter body-count in excess of forty million, the prostitution of our medical and legal professions, and the predictable sequella of the foundational deterioration of the sanctity of all innocent human life, which has indeed occurred and is advancing. It must also acknowledge the personhood of the unborn child, and indeed of every human being, thereby entitling every member of the human family to the constitutional rights of due process and equal protection of the law.

If “what we are” can be reduced by arbitrary definition to “what we can do,” then we will have validated “definitional dehumanization,” effectively adopted by the Nazis, slavery, and pre-civilization savages. And it promptly will be extended—as is already occurring—beyond the unborn to the newborn, the special born, and the long-born, the retarded, the crippled, the unproductive and countless other categories of “useless eaters.” Surely this cannot have been the understanding or intent of the framers of the Fourteenth Amendment. Our continued existence as a free nation is in the balance. The hour is late.

---

<sup>29</sup> *Fordham Law Review* (May 1973).