

WHAT THE MISSISSIPPI PERSONHOOD AMENDMENT TELLS US ABOUT “LIFE”

*Caitlin E. Borgmann**

“Personhood amendments,” which would define legal personhood as beginning at fertilization, appear to be gaining momentum in the United States. This November, Mississippi voters will decide whether to add the following provision to the Mississippi Constitution’s Bill of Rights: “Person defined. 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.”¹

The Amendment sounds extreme, and its potential consequences are indeed far-reaching.² One useful purpose the proposed Amendment has served, however, is to shine a light on a time-worn mantra uttered in support of abortion restrictions, “Life begins at conception.” Religious leaders say it, politicians say it, members of the public say it. It has intuitive appeal, but what does it mean? This essay examines the ways in which defining legal personhood as beginning at fertilization helps bring to the fore a question that tends to lurk in the shadows of the abortion debate: the meaning of “life.”

When most of us hear the word “life,” we instinctively think of our own lives or of the universal value of human life. Amendment 26 supporter Rebecca Kiessling claims she was “conceived in rape” and uses this to argue that women who become impregnated by their rapists should be forced to carry their

* Professor of Law, CUNY School of Law; B.A., Yale University; J.D., New York University School of Law. I am grateful to the editors of the *Mississippi Law Journal* for inviting me to participate in this symposium issue and for their editing and research assistance.

¹ Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), *available at* <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.

² *See infra* p. 123.

pregnancies to term.³ At a Mississippi College School of Law forum on Amendment 26, Kiessling exclaimed to the audience, “I love my life!”⁴ Undoubtedly she does. But what is the “life” that she loves? Kiessling is an educated woman with a family and a rewarding career. To every person in the audience, it must have been clear that Kiessling values much more than the simple biological fact that she is alive. Of course, life in this thick sense is not always rewarding. In fact, it may be difficult and dangerous. But such a life too is rich with successes and failures, pleasure and pain, moral and religious beliefs, commitments, aspirations, and family ties.⁵ A zygote or embryo clearly is not a “life” in this thick, multi-layered sense. It is alive, but only in the minimal, thin sense that it is an organism in the process—if all goes well⁶—of developing into a person.⁷

Clearly, then, a declaration that “life begins at conception” does not begin to answer the question of the moral value of a zygote, embryo, or fetus and how it should be treated under the law. Its use is a bait-and-switch maneuver that appeals to the thick versions of “life” that do not and cannot apply in the abortion context (except with respect to the woman’s life, which abortion rights opponents tend to ignore). “The unsurprising fact that an embryo or fetus is, biologically, ‘human life’ simply does not answer the moral (or legal) question whether and when that ‘life’ is to be accorded some or all of the rights of a person.”⁸

³ See Rebecca Kiessling, *What Rape Exceptions Really Mean*, REBECCA KIESSLING, <http://www.rebeccakiessling.com/index.html> (last visited Nov. 2, 2011).

⁴ See Rebecca Kiessling, Speaker at Mississippi College School of Law Symposium: Amendment 26—Exploring the Implications of Mississippi’s Personhood Initiative (Oct. 25, 2011) (video recording on file with Mississippi College School of Law).

⁵ Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 593 (2009).

⁶ While abortion or some forms of contraception may interfere with a zygote’s journey toward birth, so may the normal process of in vitro fertilization and stem cell research. Even absent these interferences, a zygote or embryo has fairly low odds of developing into a person; studies suggest that up to fifty percent or more of all embryos are spontaneously aborted, most without the woman even knowing it. See John C. Petrozza, M.D., *Recurrent Early Pregnancy Loss*, MEDSCAPE REFERENCE (Jan. 5, 2011), <http://emedicine.medscape.com/article/260495-overview>.

⁷ See generally Borgmann, *supra* note 5 (distinguishing between “thick” and “thin” notions of “life” and arguing that conservatives trade on the thick versions of life in opposing abortion, while actually employing the term only in its thin sense).

⁸ Borgmann, *supra* note 5, at 555.

Amendment 26 addresses this question head-on, contending that legal and moral personhood exists at fertilization.⁹ The amendment therefore provides occasion to consider whether such a position is, not just a sincere belief, but consistent with the considered judgments of those who profess it as well as with public reason.¹⁰

The supporters of Amendment 26 have described it as a measure aimed at outlawing abortion.¹¹ They claim as their goal to "challenge Roe-v-Wade at it's [sic] very core."¹² They have tended to dismiss any discussion of broader ramifications as "fear-mongering."¹³ Some have argued, even as to abortion, that the amendment is not self-executing but only makes a policy statement in favor of embryonic personhood,¹⁴ an interpretation that would surely surprise the many voters who apparently view the amendment as an abortion ban.

⁹ See Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), available at <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.

¹⁰ See Borgmann, *supra* note 5, at 554-55.

¹¹ See *Amendment 26: Why?*, PERSONHOOD MISSISSIPPI, <http://personhoodmississippi.com/amendment-26/why.aspx> (last visited Nov. 2, 2011).

¹² *Id.*

¹³ See, e.g., Terri Herring, *PRO: Constitution should define life at conception*, CLARION LEDGER (Oct. 16, 2011), <http://beta.clarionledger.com/article/201111016/OPINION03/110160302/1046>; *The TRUTH About VOTING YES on Initiative 26: What Mississippi Personhood Will and Will Not Do*, PRO-LIFE MISS., <http://www.prolifemississippi.org/> (last visited Nov. 2, 2011). Their rhetoric conceals a sleight of hand, however. The proponents claim the amendment "WILL NOT outlaw any contraceptives," but they label the implicated types of contraception as abortion, referring to them as "chemicals and devices that kill the tiniest boys and girls after fertilization." *Id.* Similarly, they claim the measure "WILL NOT end in vitro fertilization," while condemning practices that are an integral part of the IVF process. *Id.*; see also Michelle Goldberg, *Will Mississippi Ban IVF*, U.S. POLITICS (Oct. 24, 2011), <http://www.thedailybeast.com/articles/2011/10/24/personhood-ballot-initiative-in-mississippi-could-ban-some-ivf-practices.html>.

¹⁴ See, e.g., Hughes v. Hosemann, 68 So. 3d 1260, 1267 (Miss. 2011) (Randolph, J., concurring) (proponents argue that the amendment "proposes no new right, . . . modifies no existing right, and . . . repeals no portion of the existing Bill of Rights."); Michael J. New, *Personhood in Mississippi*, THE CORNER (Sept. 14, 2011 2:54 PM), <http://www.nationalreview.com/corner/277111/personhood-mississippi-michael-j-new> (claiming amendment is not self-executing); cf. Christopher R. Green, *A Textual Analysis of the Possible Impact of Measure 26 on the Mississippi Bill of Rights*, 81 MISS. L.J. SUPRA 39, 41 (2011) (claiming that the amendment might not prohibit abortion on its own).

Regardless, the wording of the amendment reaches far beyond abortion, describing all fertilized human eggs as “persons” entitled to protection under Mississippi’s Bill of Rights. To eliminate any question about broader ramifications, the drafters simply could have tailored the amendment to abortion. But they chose not to. Indeed, the supporters claim that, “[i]f Mississippians vote Yes on Amendment 26, all human beings would be ensured equal rights in our state [and] protection under law - regardless of their size, location or developmental stage.”¹⁵ That the amendment is placed in the Mississippi Constitution’s Bill of Rights, rather than the preamble or some other section,¹⁶ seemingly has some significance.¹⁷ As the supporters recognize, the amendment is essentially an equal protection clause for fertilized eggs and the unborn.

The amendment’s meaning and legal effect will ultimately have to be determined by the Mississippi courts. In 1989, the Supreme Court left it to the Missouri courts to decode a similar-sounding statutory provision challenged in *Webster v. Reproductive Health Services*.¹⁸ That provision, found in the preamble to Missouri’s omnibus abortion law, included the state legislature’s “findings” that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life, health, and well-being.”¹⁹ It also required that Missouri law

be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court

¹⁵ *Amendment 26: Why?*, *supra* note 11.

¹⁶ *Cf.* MISS. CONST. pmb. (“We, the people of Mississippi in convention assembled, grateful to Almighty God, and invoking his blessing on our work, do ordain and establish this constitution.”).

¹⁷ *Cf.* *Oktibbeha Cnty. Bd. of Educ. v. Sturgis*, 531 So. 2d 585, 588 (Miss. 1988) (“When a constitutional provision grants a distinct right, the provision is self-executing and requires no legislation to effectuate it.”).

¹⁸ 492 U.S. 490 (1989).

¹⁹ MO. REV. STAT. §§ 1.205.1(1), (2) (1999).

and specific provisions to the contrary in the statutes and constitution of this state.²⁰

Missouri disavowed the apparently sweeping implications of this provision, arguing that it was merely "precatory and impose[d] no substantive restrictions on abortions."²¹ The Supreme Court deferred to this interpretation, noting that "[t]he preamble [could] be read simply to express [a] value judgment" and that the Missouri courts alone had the authority to read it more broadly.²²

Amendment 26 on its face grants zygotes and embryos personhood status only under the Mississippi Constitution's Bill of Rights. The Mississippi Supreme Court could interpret Amendment 26 to state only a policy position or "value judgment" favoring legal equality for embryos that has no direct legal effect. But this seems difficult given the provision's unequivocal wording and its placement in the Bill of Rights.²³ Or the court could construe the provision to apply only to protections found expressly in the Bill of Rights, thus leaving undisturbed the meaning of "person" under statutes that do not implicate the Bill of Rights.²⁴ In order to conclude that, however, the court would have to find that the Mississippi Bill of Rights encompasses no equality protection (for example through its due process clause), a ruling that one would imagine might be politically and normatively unpalatable.²⁵

²⁰ *Id.* § 1.205.2.

²¹ *Webster*, 492 U.S. at 505.

²² *Id.* at 506. The Court did implicitly acknowledge, however, that the language of the preamble would bear this broader interpretation. *See id.* ("It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way.")

²³ *See, e.g., Oktibbeha Cnty. Bd. of Educ. v. Sturgis*, 531 So. 2d 585, 588 (Miss. 1998).

²⁴ *See Green, supra* note 14, at 42.

²⁵ *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying equal protection principles to federal government through Fifth Amendment Due Process Clause); 2 ROBERT F. WILLIAMS, *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 20-27* (G. Alan Tarr & Robert F. Williams eds., 2006); Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773 (2009) (describing widespread protection of equality in state constitutions). The Mississippi Supreme Court apparently has not expressly addressed this question, although litigants have frequently asserted, and several opinions imply, that the due process clause of the Mississippi Constitution encompasses equal protection. *See, e.g., Westbrook v. Jackson*, 665 So. 2d 833 (Miss.

More important, we should consider why anyone would strain to give the amendment such limited scope. If the amendment's language is taken at face value, then it makes no normative sense to limit its impact.²⁶ This amendment forthrightly takes the position that we so often hear abortion proponents asserting: that human life has the same moral significance at the moment of conception as it does when a person is born. A limited construction of the amendment is in fact a denial of its premise, and we should recognize it as such.²⁷

The standard liberal response to the assertion that "life begins at conception," however, recoils from such recognition. The liberal approach maintains that it is fine for people to hold that belief, but impermissible for them to impose it on everyone else.²⁸ Liberals consider this approach respectful because it does not doubt the sincerity of anyone's belief.²⁹ Indeed, it does not address the content of the belief at all, and this is precisely the problem. The liberal approach does not really take the claim seriously. It tells the holder of this belief to keep it under wraps. To a person who believes that an embryo is a person, that is insulting. It is akin to saying a person must keep to herself the belief that people on death row, or the elderly, are people. The position that personhood begins at conception, if taken at face value, is non-negotiable; if valid, it *must* be imposed on society. A serious moral conversation on abortion therefore demands that we examine the consistency of the premise that personhood begins at fertilization.

1995) (referring to state equal protection and appearing to address equal protection argument on the merits); *Barnwell, Inc. v. Sun Oil Co.*, 162 So. 2d 635, 641 (Miss. 1964) ("We do not believe the appellants have been denied due process of law and equal protection of the laws under the Constitutions of the State and Federal Governments."); Brief for Appellant, *Goldsby v. State*, 123 So. 2d 429, 431 (Miss. 1960) (No. 41547), 1960 Miss. LEXIS 488, at *9 (counsel argued that "the trial court denied to appellant equal protection of the laws, and deprived the appellant of a fair trial in violation of the provisions of the 14th amendment to the United States, and of article 3, section 14 of the Mississippi Constitution of 1890").

²⁶ See Jonathan F. Will, Op-Ed., *Life and Law – The Commitment to Pre-Embryonic Personhood*, MISS. BUS. J. (Sept. 23, 2011), <http://msbusiness.com/2011/09/op-ed-life-and-law-%E2%80%94the-commitment-to-pre-embryonic-personhood/>.

²⁷ See Borgmann, *supra* note 5, at 573.

²⁸ *Id.* at 573 & n.106.

²⁹ *Id.* at 572-73.

To be fair to their opponents, abortion rights supporters need to grapple with this question.

And to be fair, abortion rights opponents need to grapple with it too. Too often, they meet demands for clarity and consistency with indignation and a refusal to engage in the conversation.³⁰ Upon closer examination, however, a person who asserts that “life begins at conception” generally does not seem to mean that legal personhood begins at conception. Often people making this claim have simply not thoroughly contemplated whether that is what they mean, and on reflection they seem uncomfortable with the idea. A journalist’s interviews of anti-abortion protestors in Libertyville, Illinois, in 2007 revealed that many had not even contemplated the possibility that a woman should be punished for obtaining an illegal abortion.³¹ When pressed, most did not feel that she should be punished, even though they claimed that abortion was “murder.”³²

Many who oppose abortion rights implicitly reject embryonic or fetal personhood, although they rarely say so explicitly. Michael J. New, for example, writes in the National Review Online that:

Personhood Amendments place the pro-life movement on some very difficult political terrain. They force pro-life activists to publicly oppose abortion in some of the most difficult cases including rape, incest, and life of the mother. They also effectively require pro-life activists to support the banning — not just the defunding — of embryonic stem cell research. They might also require pro-lifers to oppose in vitro fertilization.

Collectively, this is a tough sell. All in all, while most Americans disapprove of abortion on demand — they do tend to think abortion should be a legal option in hard case circumstances.³³

While New himself may not endorse the idea that “abortion should be a legal option” in hard cases, his objection to personhood

³⁰ See *id.* at 585, 601-02.

³¹ AtCenterNetwork, *Libertyville Abortion Demonstration*, YOUTUBE (July 30, 2007), http://www.youtube.com/watch?v=Uk6t_tdOkwo.

³² *Id.*

³³ New, *supra* note 14.

amendments as a poor strategy for opposing abortion suggests he does not believe that zygotes and embryos are morally equivalent to persons.³⁴ Otherwise, regardless how hard the strategy, it would be morally problematic to support anything else.

The 2012 Republican presidential candidates have struggled with this tension. In particular, many have wanted to describe abortion as a “states’ rights” issue, a position that is incompatible with a view that embryos have the same moral status as persons.³⁵ For example, Minnesota Congresswoman Michelle Bachmann has said, “I am 100 percent pro-life from conception to natural death,” but has also declared that abortion is a “state issue” and suggested she might support incremental restrictions.³⁶ Former Godfather’s Pizza CEO Herman Cain tried to reassure voters that he was “100% pro-life. End of story,” after maintaining in an interview that “abortion should be left to women and their families”³⁷ In an interview, former Massachusetts Governor Mitt Romney declared his belief that “life begins in conception” but also said, “My view is that the Supreme Court should reverse *Roe v. Wade* and send back to the states the responsibility for deciding whether [abortion] is legal or not.”³⁸ Texas Governor Rick Perry has waffled between declaring abortion a states’ rights issue and stating his support for a federal constitutional amendment banning abortion.³⁹

Amendment 26, at least on its face, seems prone to no such ambiguity. And its supporters appear to embrace the view that embryos are morally the same as persons. They state that, under the amendment, “all human beings would be ensured equal rights in our state & protection under law - regardless of their size,

³⁴ *Id.*

³⁵ See Borgmann, *supra* note 5, at 583.

³⁶ Craig Robinson, *Bachmann on Late Term Abortion Bans: “That’s a State Issue,”* THE IOWA REPUBLICAN, Oct. 17, 2011, <http://theiowarepublican.com/2011/bachmann-on-late-term-abortion-bans-%E2%80%9Cthat%E2%80%99s-a-state-issue%E2%80%9D/>.

³⁷ Catalina Camia, *Herman Cain Clarifies Abortion Stance*, USA TODAY ON POLITICS (Oct. 20, 2011 2:42 PM), <http://content.usatoday.com/communities/onpolitics/post/2011/10/herman-cain-homosexuality-abortion-cnn-interview-1>.

³⁸ Maggie Haberman, *Romney Talks Abortion with Huckabee*, POLITICO (Oct. 1, 2011 10:02 PM), <http://www.politico.com/news/stories/1011/64902.html>.

³⁹ Ed Kilgore, *The Hypocrisy of “States’ Rights” Conservatives*, SALON (Aug. 7, 2011 9:01 AM), http://www.salon.com/2011/08/07/Kilgore_states_rights/.

location or developmental stage.”⁴⁰ That statement forthrightly expresses the view that, once a human egg is fertilized by a human sperm, the resulting union immediately yields a person of the exact same moral status as you and me. The implications of this position, of course, are astonishing. Some forms of contraception, such as emergency contraceptive pills and IUDs, would be impermissible. So would in vitro fertilization as currently practiced. Women’s pregnancies would have to be policed to ensure that women did not criminally endanger or kill their embryos or fetuses through their conduct. Medical providers caring for pregnant women might have to give equal regard to the fetus’s life in choosing treatment options even where the woman’s life was in danger. Laws far outside the reproductive sphere, including those affecting inheritance, census-taking, and apportionment would arguably be implicated.

One would imagine that nearly everyone would find these consequences ultimately untenable.⁴¹ This is not simply because people want in vitro fertilization or contraception for selfish reasons, or otherwise feel that their self-interests are in jeopardy. It is because equating a zygote or embryo with a fully developed human being simply does not fit our considered judgments about the meaning of personhood and “life” in its thick sense. Any person who doubts this would do well to try this helpful thought experiment:⁴² Imagine a fertility clinic is burning, and you happen to be standing outside. When you rush in to help, you see a toddler sitting on the floor crying and a tray of 100 frozen embryos in a freezer. You could manage to grab and rescue one or the other, but not both. Which would you choose?

The way in which Amendment 26 highlights these issues no doubt causes some discomfort to mainstream abortion rights

⁴⁰ *Amendment 26: Why?*, *supra* note 11.

⁴¹ See, e.g., Jen Chung, *Mississippi Personhood Law Proposes To Make Abortion, Birth Control, IVF Illegal*, GOTHAMIST (Oct. 26, 2011, 5:37 PM), http://gothamist.com/2011/10/26/latest_threat_to_womens_right_to_ch.php (describing Democratic gubernatorial candidate Johnny DuPree as voicing support for Amendment 26 and stating, “[m]y daughter who we didn’t abort has a 4-year-old son. He is an in vitro baby.”).

⁴² See George J. Annas, *A French Homunculus in a Tennessee Court*, HASTINGS CTR. REP., Nov.–Dec. 1989, at 20, 22 (attributing this hypothetical to Dr. Leonard Glantz of Boston University School of Public Health).

opponents like the National Right to Life Committee.⁴³ But it is a conversation that should no longer be avoided by either side of the debate. If abortion rights opponents prefer to support restrictions less extreme than this measure, they should first admit that, while an embryo has moral value,⁴⁴ it is not equivalent to a fully developed human. Moreover, they must be able to explain why they support or tolerate abortion in some contexts but not others.⁴⁵ And abortion rights supporters must insist on these explanations. A far more meaningful and honest public debate could then be had about whether and when abortion and other reproductive health services should be permitted. So far, it has been almost impossible to get either side to engage in this conversation. If nothing else, we can hope that Amendment 26 helps to make that happen.

⁴³ See Erik Eckholm, *Push for 'Personhood' Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES, Oct. 25, 2011, at A16, available at <http://www.nytimes.com/2011/10/26/us/politics/personhood-amendments-would-ban-nearly-all-abortions.html> (“[T]raditional leaders of the [anti-abortion] fight, including National Right to Life and the Roman Catholic bishops, have refused to promote [personhood amendments], charging that the tactic is reckless and could backfire.”).

⁴⁴ Most, but not all, would ascribe a higher moral value to a human embryo than other kinds of cells. And most likely accept a gradualist view of the moral value of human life that sees it as important but much less weighty at conception than at the very end of pregnancy, when it approaches and eventually equals the value of born persons. See Borgmann, *supra* note 5, at 602. Of course, there is undoubtedly widespread variation even within these parameters. This is a conversation that is beyond the scope of this essay, but it does help to show why an absolutist position that forces everyone to assume personhood from the time of fertilization offends the dignity of each person to form his or her own moral views on the topic. *Id.*

⁴⁵ *Id.* at 585.