

MYTH 02

"ABORTION IS A CONSTITUTIONAL RIGHT."



MYTH #2: "ABORTION IS A CONSTITUTIONAL RIGHT."

The Supreme Court of 1973 was ideologically disposed to find a way to legalize abortion when they agreed to hear the cases of *Roe v. Wade*, and its companion case, *Doe v. Bolton*.[12] They knew where they wanted to end up (legal abortion), but they had to find a way to justify this action.[13] They needed to make a convincing argument that the Constitution allowed the destruction of human life that would occur with legal abortion.[14]

As mentioned previously, the Declaration of Independence states, "We hold these truths to be self-evident, that all men are **created equal**, that they are endowed by their Creator with certain unalienable Rights, that among these are **Life, Liberty and the pursuit of Happiness**."[15] Notice our Forefathers wrote "created," not "born." In addition, the 14th Amendment states "...nor shall any state deprive a person of life, liberty or property, without **due process of the law**; nor deny any person within its jurisdiction the **equal protection of the laws**."[16] Based on these two statements, it is hard to see how ending an unborn human's life can be considered "constitutional."

Thus, the Justices were obligated to do two things. They had to make an argument for why unborn life did not deserve to be treated as a life covered by these statements, and they had to find other constitutional statements that gave a woman the power to end this life.[17] Prior Supreme Court decisions had established a right to *contraceptive use* by married couples in *Griswold v. Connecticut*, and later by single people in *Eisenstadt v. Bard*, based on the "**right of privacy**," a phrase that when previously documented in the Constitution was related to the right to own private property.[18] It was then extrapolated that abortion, being a method of birth control (although it is not a method of contraception because it occurs after conception has occurred), should be covered by a woman's right to privacy, or ownership of the fetus (even though, of course, the surgical procedure does not occur in the privacy of her own home).[19]

The Court professed ignorance about when life begins and advanced an argument based on "**personhood**" instead. Justice Blackmun stated, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at a consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate."[20] This was feigned ignorance. As we have discussed, an unborn human is clearly alive by the time the pregnancy is recognized (5-7 days after fertilization), and some scientists still debate whether life begins at fertilization or implantation. By claiming that this small window of time between fertilization and implantation constituted a non-consensus and therefore allowing the procedure of abortion without restriction until birth, the Court actually took a side on the question of when life begins, and gave it the most extreme definition possible. Inexplicably, the Court twisted the statement about liberty by applying it to the woman, while denying it to the unborn human. They stated that "liberty" means a "right to privacy," which is broad enough to encompass the decision to terminate an unborn child's life.[21]

The argument for abortion based on "personhood" rather than "life" is a weak one. The thought, apparently, was that a fetal human being who had supposedly not yet achieved personhood was of lesser value than one who had achieved personhood, and his life could be ended if the needs of an actual person required it. Obviously, this argument is extremely dubious because few can agree on just what "personhood" entails. One common definition of a person is "a being that has certain capacities or attributes such as reason, morality, consciousness or self-consciousness…"[22]

On a historical note, many of the arguments made against personhood have been used before regarding certain ethnic groups, such as blacks and Native Americans. In the 1857 *Dred Scott v. Sandford* decision, the Supreme Court ruled that slaves are not legal people.[23] Abraham Lincoln once remarked that any argument used to disqualify blacks as human beings works equally well to disqualify whites. "Does color give the right to enslave? There will always be someone with lighter skin color. Intellect? There will always be a superior intellect. Interest? It may be in someone else's best interest to enslave you."[24] The same is true for the personhood of the fetus. For almost any criteria, there will be some unborn people who meet that criteria, and some born people who don't (except for location, by definition).

It is also interesting to note that there are some groups who would like to extend personhood to species other than homo sapiens. The Nonhuman Rights Project has filed many lawsuits to declare legal personhood for chimps, elephants, dolphins, and whales.[26] Many people have criticized the slaughter of dolphins in Japan by likening them to persons. Likewise, the founder of People for the Ethical Treatment of Animals has famously declared, "A rat is a pig is a dog is a boy," indicating that all these animals are equivalent beings.[27] It seems that the term "personhood" has lost all meaning if it can be applied to smart animals, but not to fetal humans.

There are even some who feel that personhood does not begin until the baby draws his first breath at **birth**, and that this is the definition of personhood used by the Supreme Court in 1973. Although *Roe v. Wade* allowed the states to prohibit abortion at viability, if desired, the Supreme Court ruling itself did not prohibit abortion at any time during which the fetus resides within the uterus.[28]

There are even some who don't ascribe personhood until **self-awareness** is reached. This is a viewpoint obviously fraught with difficulty. This may not occur until late in the life of a child, perhaps never in one who is seriously disabled, and it is not a persistent state even in a normal adult. We usually don't have self-awareness when we are sleeping, and we could lose it if we become brain-damaged or develop dementia. Some have taken this argument further, and justified killing a baby after birth if a disability is discovered that was not known before birth.[29] [30] The Netherlands, no stranger to the active killing of living human beings through euthanasia, initiated the Groningen Protocol in 2002, whereby physicians could actively terminate the lives of infants with hopeless prognoses.[31] Infanticide is just the next step in the process if personhood is based on self-awareness.

The obvious problem with assigning personhood at a **specific threshold** in pregnancy is that it is an **arbitrary** distinction. What makes one day significantly different from the day before? It's safe to say that most people feel intuitively that a fetus is a person before birth, but how do we decide when this occurs in the continuum of fetal development? Since *Roe v. Wade* stated that personhood does not extend prenatally, this allows abortions to be committed legally up until immediately before birth (if not prohibited by the state) if an abortionist can be found who is willing to commit the procedure. In 2016, there were 40 facilities in the U.S. that will perform an elective abortion after 24 weeks gestation. Five of these (Southwestern Women's Options in Albuquerque, N.M.; Pro-Choice Medical Center in Beverly Hills, Calif.; Boulder Abortion Clinic in Boulder, Colo.; Germantown Reproductive Health Services in Germantown, Md.; and Women's Med Center in Kettering, Ohio) will conduct elective abortions throughout all nine months of pregnancy.[32]

THE OBVIOUS PROBLEM WITH ASSIGNING PERSONHOOD AT A SPECIFIC THRESHOLD IN PREGNANCY IS THAT IT IS AN ARBITRARY DISTINCTION.

NOTES

12 *Roe v. Wade* 410 U.S. 179 (1973); *Doe v. Bolton* 410 U.S. 179 (1973).

13 Jack Balkin, ed., *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Re-write America's Most Controversial Decision* (NYU Press, 2007).

14 Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (New York: Wilsted & Taylor, 2013).

15 National Archives.

16 Ibid.

17 Drew Humphries, "The Movement to Legalize Abortion: A Historical Account," in David F. Greenberg, ed., *Corrections and Punishments* (Beverly Hills, CA: Sage Publications, 1977).

18 *Griswold v. Connecticut* 381 U.S. 479 (1965); *Eisenstadt v. Baird* 405 U.S. 438 (1972).

19 Marian Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision That Made Abortion Legal* (Cooper Square Press, 1988).

20 *Roe v. Wade* 410 U.S. 113 (1973).

21 Marian Faux.

22 "Person," Wikipedia, accessed November 27, 2018, https://en.wikipedia.org/wiki/Person.

23 Ethan Greenberg, *Dred Scott and the Dangers of a Political Court* (Lexington Books, 2009).

24 Ibid.

25 "Litigation," Nonhuman Rights Project, accessed November 27, 2018, https://www.nonhumanrights.org/litigation/.

26 "Stop the Taiji Slaughter," International Marine Mammal Project, accessed November 27, 2018, http://savedolphins.eii.org/campaigns/sjd/.

27 Ingrid Newkirk, "A Rat Is a Pig Is a Dog Is a Boy," People for the Ethical Treatment of Animals, August 28, 2012, accessed November 27, 2018, https://www.peta.org/blog/rat-pig-dog-boy/.

28 "ROE v. WADE," FindLaw, accessed November 27, 2018, http://caselaw.findlaw.com/us-supreme-court/410/113.html.

29 Alberto Giubilini and Francesca Minerva, "After-birth abortion: why should the baby live?" *Journal of Medical Ethics* (2012), accessed November 27, 2018, http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.

30 Helga Kuhse and Peter Singer, et al., *Should the Baby Live? The Problem of Handicapped Infants* (Oxford University Press, 1985), 143.

31 Eduard Verhagen and Pieter J.J. Sauer, "The Groningen Protocol—Euthanasia in Severely Ill Newborns" *The New England Journal of Medicine* 352 (2005): 959-962, accessed November 27, 2018, http://www.nejm.org/doi/full/10.1056/NEJMp058026.

32 "Number of Late-term Abortion Facilities in the USA May Surprise You," Operation Rescue, March 11, 2016, accessed March 3, 2018, https://www.operationrescue.org/archives/number-of-late-term-abortion-facilities-in-the-usa-may-surprise-you/.