Personhood Amendment’s Far-Reaching Implications Should Be Addressed and Reconciled

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Introduction
During the recent November 2011 election, citizens in Mississippi voted to reject Initiative Measure No. 26 (Initiative 26),1 a proposed amendment to the state constitution that would have defined a fertilized egg as a person.2 If Initiative 26 had passed, Mississippi would have become the first state to define a “person” as “every human being from the moment of fertilization, cloning or the functional equivalent thereof.”3 This definition of “person,” which goes well beyond the plain, ordinary meaning found in Webster’s Dictionary,4 stems from the work of Personhood USA, the main group behind supporting Initiative 26 and the overall “personhood” movement in the U.S.5

On its face, Initiative 26 -- referred to as the “Personhood Amendment” -- purportedly would have banned all abortions in Mississippi; but there is much more to it than just criminalizing abortions.6 Initiative 26 contains far more ramifications than its initial sponsor7 may have contemplated. In the months leading up to the 2011 election, members of medical, legal, and infertility advocacy groups expressed concern that Initiative 26 would have a chilling effect on the ability to terminate complicated life-threatening pregnancies, use of certain kinds of birth control, use of in vitro fertilization (IVF)8

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3 See Initiatives – 26 Definition of a Person, supra note 1.
4 According to Webster’s Dictionary, a “person” is defined as: human being, individual. WEBSTER’S NINTH COLLEGIATE DICTIONARY 877. Merriam Webster, Inc. (1985).
7 Mr. P. Leslie Riley is the initial sponsor on Initiative Measure No. 26. Personhood USA, a nationwide campaign, supported Mr. Riley’s efforts in submitting the proposed amendment. See infra notes 12 - 18 and accompanying text.
8 In vitro fertilization (IVF) is one of the assisted reproductive technology (ART) procedures used to treat infertility. It involves aspirating eggs from a woman’s ovaries, combining them with sperm in the laboratory setting to create embryos, and then implanting the embryos in the woman’s uterus or donating them to another woman. See Society for Assisted Reproductive Technology (SART) and
procedures, and human embryonic stem cell research. Moreover, there were questions about how compliance with the proposed “Personhood Amendment” could be effectively enforced.”

Personhood USA blames Planned Parenthood for the defeat of Initiative 26 in Mississippi, claiming the organization promulgated lies and misconceptions about the scope of the Initiative’s implications for birth control and IVF. Specifically, Personhood USA claims that, contrary to what Planned Parenthood had espoused, Initiative 26 would not have banned birth control or IVF. But to date, Personhood USA has failed to explain how birth control and IVF would be spared, and it has failed to address and reconcile the other issues that have been raised, such as ectopic pregnancies, miscarriages, and women’s access to necessary healthcare. These issues and the far-reaching consequences of Initiative 26 and other “personhood amendments” cannot be ignored.

Despite the defeat in Mississippi, Personhood USA continues to pursue its nationwide effort to put “personhood amendment” initiatives similar to Initiative 26 on 2012 ballots in nine other states across the country. But voters will need explanations and answers; otherwise, “personhood amendments” similar to Initiative 26 will more than likely fail in every state.

Background History on Initiative 26 and the “Personhood” Movement

The history behind Initiative 26 stems back to 1992 when Mississippi enacted a law allowing citizens to propose changes to the state constitution through an indirect initiative process. This process gives citizens the right to submit and sponsor a proposed amendment to the state constitution. Sponsors must collect the requisite number of certified signatures on a petition. The Legislature is


10 Mississippi Anti-Abortion ‘Personhood’ Amendment Fails at Ballot Box, supra note 2.

11 Personhood USA Blames Planned Parenthood For Loss in Mississippi, supra note 2.

12 Id.

13 Id.


16 Id.

17 Id.
given an opportunity to hold hearings and propose alternatives to the citizen initiative before it is placed on the ballot.\(^\text{18}\)

In 2009, Mr. P. Leslie Riley, Jr., a proponent of the U.S. “personhood” movement, pursued the indirect initiative process and submitted a request to the Mississippi Secretary of State,\(^\text{19}\) seeking to amend Article III of the state constitution to read:

> The term “person” or “persons” shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof.\(^\text{20}\)

Mr. Riley collected the requisite number of certified signatures on the petition,\(^\text{21}\) and his proposed amendment was then officially placed on the November 8, 2011 ballot.\(^\text{22}\)

Mr. Riley is the founder of Personhood Mississippi, an organization whose mission was to achieve passage of Initiative 26.\(^\text{23}\) Personhood Mississippi receives support from Personhood USA, the Colorado-based group promoting the nationwide campaign to define when life begins to undermine the case for legalized abortion.\(^\text{24}\) Personhood USA leads the charge in supporting ballot measures similar to Initiative 26 in other states with the intent to imbue fertilized eggs with the full status and legal rights of human beings.\(^\text{25}\) Although Mississippi was the only state with a “personhood” measure on its ballot this year, similar initiatives are planned in the future for Arizona, Georgia, Florida, Montana, Nevada Ohio, South Carolina, and Wisconsin.\(^\text{26}\) Colorado rejected a “personhood” amendment in both the 2008 and 2009 elections.

Supporters of Initiative 26 believed that, if it had passed, it would have drawn legal challenges because its conflicts with the Supreme Court’s decision in *Roe v. Wade*\(^\text{27}\) that

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\(^{18}\) *Id.* The Legislature cannot veto or amend the original citizen initiative, but only can pass an alternative that will appear on the ballot alongside the original initiative.

\(^{19}\) At the time, John Helmert was the Secretary of State of the State of Mississippi.


\(^{21}\) A minimum of 89,285 certified signatures must be gathered, with at least 17,857 certified signatures from each of the five congressional districts as they existed in the year 2000. See Delbert Hoseman, Secretary of State, *Initiative Measure No. 26*, available at [http://www.sos.ms.gov/page.aspx?s=7&s1=1&s2=50](http://www.sos.ms.gov/page.aspx?s=7&s1=1&s2=50).

\(^{22}\) *Id.*


\(^{26}\) Cadmin, *supra* note 23; *The Chilling Effect of Mississippi’s “Personhood” Amendment, supra* note 6.

established a legal right to abortion. Supporters of Initiative 26 were hoping that it would at least provoke a lawsuit to challenge the Roe v. Wade ruling. According to Mr. Riley, Initiative 26 defined “personhood” as the U.S. Supreme Court should have defined it during the 38 years since Justice Harry Blackmun’s majority opinion in Roe v. Wade. Mr. Riley believes that “personhood” amendments, such as Initiative 26, hold the key to filling in the “Blackmun Hole” -- a term referencing Justice Blackmun’s statement about the fetus and whether it is a “person” within the meaning of the Fourteenth Amendment. In Roe, Justice Blackmun wrote:

The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment . . . . If this suggestion of personhood is established, the appellant’s case [legalizing abortion], of course collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.

Supporters believed that if Initiative 26 had passed, it would have created the momentum to fuel the efforts of the Personhood USA campaign to outlaw abortions nationwide.

Far-Reaching Consequences of Initiative No. 26

The nebulous language in Initiative 26, “... from the moment of fertilization, cloning or the functional equivalent thereof,” opened the door for numerous interpretations and implications. Given this vague language, if it had passed, Initiative 26 purportedly would have outlawed all abortions, regardless of the need to save the life of the mother or for victims of rape or incest. Moreover, it would have banned certain forms of birth control, such as the intrauterine device (IUD) or the morning-after pill, that are used to prevent fertilized eggs from implanting in the uterus. Further, it would have prevented future embryonic research for advancement of medical treatments to the extent that such research destroys embryos. Finally, perhaps the most significant chilling effect of Initiative 26 -- if it had passed -- would have been the potential limits it placed on the use of assisted reproduction procedures, such as IVF.

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28 Mississippi ‘Personhood’ Amendment Vote Fails, supra note 14.
29 Id.
30 See Cadmin, supra note 23.
31 Id.; PersonhoodUSA, What is Personhood?, http://www.personhoodusa.com/what-is-personhood/.
32 Roe, 410 U.S. at 156-157; see also Ashley, supra note 24.
33 Ashley, supra note 24.
Approximately 7.3 million women and their partners, or 12 percent of the reproductive-age population in the United States suffer from infertility. Within a given IVF treatment cycle, multiple eggs are fertilized in the laboratory to create multiple embryos. These embryos are allowed to develop for three to five days before one or more are transferred to the woman’s uterus with the hope that one will implant and develop into a fetus and a viable baby. Often, excess unused embryos are frozen, or cryopreserved, for future use in subsequent attempts at pregnancy.

Initiative 26, if passed, would have called into question the implementation of any one of the IVF procedures if such procedures could place an embryo at risk for harm. For instance, if embryos in a given IVF cycle failed to develop normally in the laboratory or were inadequate for transfer into the woman’s uterus for pregnancy, what should the physician or laboratory do with the defective embryos? Or, what if viable embryos are transferred to a woman’s uterus, but do not result in a live birth after the transfer? And what about the IVF procedures that require manipulation of embryos? Would Initiative 26, if it had passed, allow physicians to perform pre-implantation genetic diagnosis (PGD) on embryos before transfer? What are physicians to do with the embryos found to have known debilitating or fatal genetic diseases? Can the physician or laboratory be held criminally liable if they discard the defective embryos?

And who would have the legal responsibility for the excess frozen embryos created during IVF cycles, but not transferred to a woman’s uterus? Would Initiative 26, if passed, have prohibited fertility patients from donating their frozen embryos to research? Would it have effectively limited IVF patients’ rights to decide the disposition of their frozen embryos?

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37 Id.


39 The Chilling Effect of Mississippi’s “Personhood” Amendment, supra note 6.

40 Preimplantation genetic diagnosis (PGD) is a technique used in conjunction with in vitro fertilization (IVF) to test embryos for specific genetic disorders prior to their transfer to the uterus. Am. Soc’y for Reproductive Med., Patient’s Fact Sheets: Genetic Screening for Birth Defects, available at http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_ Info_Booklets/genetic_screening.pdf.
Putting aside the issues surrounding IVF procedures, even with natural reproduction things can go awry. According to fertility specialists, studies estimate that at least two-thirds of sperm/egg fusions are in some way defective.41 Specialists estimate that, in natural reproduction via sexual intercourse, when sperm reaches the egg, for every 100 eggs produced during ovulation, only 84 percent are fertilized, 69 percent implant, 42 percent survive the first week of pregnancy, and only 31 percent actually survive to birth.42 Stated another way, even when both male and female partners are physiologically healthy and their sexual relations occur during ovulation, there is a 69 percent likelihood that they will fail to produce a child.43 Does a “personhood amendment” take into account the estimated fact that only 31 percent of eggs fertilized naturally actually result in birth? Under a “personhood amendment,” would a woman who suffers a miscarriage be subject to criminal charges for the death of her embryo?

Finally, and perhaps most importantly, if Initiative 26 had passed, how would compliance be effectively enforced?44 How would the State of Mississippi prevent or prosecute the homicide of a fertilized egg?45 Most women are not aware of the precise moment when fertilization occurs. As ridiculous as it may sound, other than having roving law enforcement officials requiring random ultrasound or pregnancy tests on women of child-bearing age, how would Mississippi protect a fertilized egg, or “person,” if the state does not know when such a “person” exists?46 These questions . . . and many more remain unanswered.

Conclusion

Consistent with the public abortion debate spanning the past 38 years since Roe v. Wade, the issue of “personhood” is an emotionally charged one, with polarized viewpoints at the opposite ends of the spectrum. Voters in states with “personhood amendment” initiatives on future ballots should carefully consider the far-reaching consequences of the “personhood amendment” and press for answers before casting their ballots.

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http://www.law.uh.edu/healthlaw/perspectives/homepage.asp

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42 Id.
43 Id.
45 Id.
46 Id.
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