Pro-Life Wisconsin
"Defending Them All"

PERSONHOOD OF THE PREBORN IN WISCONSIN: A PROTECTIVE CONSTITUTIONAL AMENDMENT AND MISGUIDED OBJECTIONS

From a pro-life perspective, the Wisconsin Constitution contains a glaring error at its outset. In specifying the beneficiaries of its human rights, it leaves out the preborn:

ARTICLE I
DECLARATION OF RIGHTS

Equality; inherent rights. SECTION 1. All people are **born** equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed. (emphasis supplied)

Pro-Life Wisconsin is proposing a minimal but absolutely essential correction, a personhood amendment, to make the Wisconsin Constitution cover all people, every person, at any stage of development. As amended, the section would read as follows:

Equality; inherent rights. SECTION 1. All people are ~~born~~ equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed. As applied to the right to life, the terms "people" and "person" shall apply to every human being at any stage of development.

The proposed amendment tracks the original as closely as grammatically possible, only substituting the inclusive personhood definition for the offending "born." It is indispensible to spreading the protective cover of Wisconsin's constitution over all its citizens. For believers in the humanity of the preborn, the measure is elementary. Yet Wisconsin Right to Life (WRL) has widely publicized that it "will oppose any effort to enact a state personhood constitutional amendment in Wisconsin," arguing paradoxically that it would threaten "protection of Wisconsin unborn children."

WRL has recently been circulating a memorandum headed:

ENACTMENT OF A "PERSONHOOD" AMENDMENT TO THE WISCONSIN STATE CONSTITUTION: A THREAT TO PROTECTION OF WISCONSIN UNBORN CHILDREN

PLW hereby answers that memorandum by quoting (in italics) its main sections in full and following each with PLW's rejoinder.

What is the specific danger of enacting a state personhood constitutional amendment in Wisconsin?

Wisconsin is one of only a handful of states with an abortion ban on the books, s.940.04 of the statutes, which would immediately go into effect when Roe v. Wade is overturned.

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If a state personhood amendment to the Wisconsin Constitution were enacted, the probable impact is: Wisconsin's abortion ban would be considered repealed by implication, or – Wisconsin's abortion ban would be declared unconstitutional and unenforceable under the State Constitution.

Should Roe v. Wade be overturned at some future date by any means, the Wisconsin state legislature would then have to enact a new abortion ban, a difficult task which is unnecessary since Wisconsin's ban is already in place.

Depending on the wording of an amendment, regulatory laws such as Wisconsin's Right to Know Act and Parental Consent Act would be subject to attack in the courts.

WRL offers no case law to back up their asserted problems, admitting that they are only "probable". We, on the other hand, offer recent Wisconsin case law clearly demonstrating that the proposed amendment is not a risk to our current, pre-*Roe* abortion law (Section 940.04, Wisconsin Statutes) by "implied repeal" or otherwise.

In *State of Wisconsin v. Glenndale Black*, 188 Wis.2d 639, 526 N.W.2d 132 (1994), in which a singularly loathsome defendant had punched his wife in the abdomen five days before her due date killing her baby, Black was charged under 940.04(2)(a) (titled "Abortion") which applies to "Any person, other than the mother, who . . . intentionally destroys the life of an unborn quick child. ." Mr. Black contended that the statute was impliedly repealed by the legislature when it later enacted Sec. 940.15 (also titled "Abortion") in response to and conforming to the dictates of *Roe v. Wade*. The Court was unpersuaded that the legislature intended to repeal 940.04 when it enacted the *Roe*-conforming 940.15. **It said, "Implied repeal of statutes by later enactments is not favored in statutory construction." (526 N.W.2d132, 134)**

For recent law on the subject pertaining to a later constitutional amendment rather than a later statute, *State of Wisconsin v. Phillip Cole*, WI 112, 264 Wis.2d 520, 665 N.W.2d 328 (2003), is instructive. The Court said in that case that it did not matter whether a statute predated or postdated a constitutional amendment in deciding the issue of the statute's constitutionality. **It found that an old statute restricting concealed carry was not repealed by a later amendment to the Wisconsin Constitution guaranteeing the right to keep and bear arms.**

The Wisconsin Supreme Court has consistently stated that acts of the legislature are presumed to be constitutional and are to be given due deference. For example, in *State ex rel. Hammermill Paper Co. v. La Plante* 58 Wis. 2d at 47 (1973), the Court, quoting Wisconsin precedent, stated: "All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law if at all possible." In *La Follette v. Board of Supervisors of Milwaukee County*, 109 Wis. 2d 621, 629, 327 N.W.2d 161 (Ct. App. 1982), the court of appeals found that where statutes predated a constitutional provision and directly conflicted with the constitutional provision, the constitution prevailed over the statutes. If a conflict exists, it is clear that the constitutional amendment prevails over the inconsistent statute. In *Aicher v. Wis. Patients Comp. Fund* 237 Wis. 2d 99, □ 20 (2000), the Court said that its duty is only to determine whether a statute "clearly and beyond doubt" offends constitutional protections. And in *State v. Zawistowski*, 95 Wis. 2d 250, 264, 290, N.W.2d 303 (1980), the Court specifically held: "All statutes passed and retained by the legislature should be held valid unless the earlier statute is completely repugnant to the later enactment." **Section 940.04 of the Wisconsin Statutes is clearly not inconsistent with, offensive or repugnant to the personhood amendment and therefore its constitutionality would not at all be threatened by the amendment.**

In summary, Wisconsin case law makes clear that the personhood amendment would not harm Wisconsin Statutes 940.04 by "implied repeal" or otherwise. Accordingly, concerns over 940.04 should not stand in the way of supporting PLW's personhood amendment.

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What is the purpose of a personhood amendment to the State Constitution?

Some states are pursuing a personhood amendment as a means to challenge Roe v. Wade. Such legislation would propose a legal definition of personhood under the 14th Amendment to the Federal Constitution with the purpose of undermining comments by Justice Blackmun in Roe v. Wade where he said that "we don't know when life begins."

By legally defining when life begins, so the theory goes, an omission in Roe can be repaired or new facts presented about which the Court was unaware in 1973.

Our proposed personhood amendment is not intended, or worded, as a challenge to *Roe,* or as an attempt to define personhood under the 14th Amendment. It seeks only to bring into the Wisconsin constitution a true definition of human life as endorsed by Wisconsin citizens speaking through the amendment process. We recognize that its protections cannot be fully effective as long as *Roe* remains law, but we believe a proper definition of personhood should be in place should Wisconsin be freed from the effects of that noxious decision.

Why is legally defining personhood a concept lacking in legal authority or results?

A declaration of personhood for the unborn child would not stop abortions from being performed. In the extremely unlikely event that the U.S. Supreme Court would uphold such a statute or amendment, a state would still have to enact further legislation to actually prohibit abortions and apply penalties.

There are not sufficient votes on the current U.S. Supreme Court to overturn Roe, regardless of what vehicle is used.

A personhood amendment would immediately be challenged in federal court where it will be struck down because Roe is in effect. Planned Parenthood and its allies will be awarded substantial attorney fees when they are successful in having the amendment struck down.

Justice Blackmun's words in Roe (regarding not knowing when life begins) should not be taken out of context. Blackmun spoke of personhood specifically in terms of the original meaning of the 14th Amendment to the Federal Constitution, and not in any broader philosophical or moral sense.

No state can by amendment to a State Constitution change the meaning of the 14th Amendment to the Federal Constitution.

Not one justice on the current Supreme Court supports the proposition that unborn children are protected as "persons" within the meaning of the 14th Amendment. Even the strongest right-to-life allies on the Court, Justices Clarence Thomas and Antonin Scalia, have rejected this interpretation for two reasons: (1) the 14th Amendment is silent on abortion and the "unborn" and (2) the 14th Amendment was not intended to take the issue away from the states, and abortion had been a matter of state criminal law since colonial times.

State legislation describing fetal development will not provide facts that the Justices do not already know. Personhood was argued to the Justices in Roe v. Wade and Doe v. Bolton in 1973, and personhood has been presented to the Justices in at least 25 briefs since 1973.

PLW does not believe, nor does it expect legislators to believe, that an amendment to the Wisconsin Constitution can remedy the federal tyranny of *Roe v. Wade* and its pernicious progeny. Still, Wisconsin can honestly state its intention to guard the humanity of all its citizens, including the pre-born, should that be made possible by the reversal of *Roe*. That is the purpose of our personhood amendment. The foregoing speculations are based on the inapplicable assumption that a personhood amendment challenges or conflicts with existing federal law based on *Roe v. Wade*. Again, PLW's personhood amendment accepts *Roe* as a given, so its definition of personhood cannot be viewed as contravening *Roe.* No one could attack the amendment based on their rights under *Roe.*