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## POSITION PAPER ON THE PROPOSED PERSONHOOD AMENDMENT TO WISCONSIN'S CONSTITUTION

*The information contained within this position paper is not intended to constitute legal advice and it should not be relied upon in lieu of consultation with a licensed attorney in the appropriate jurisdiction.*

### Background

This position paper identifies the pros and cons of enacting a personhood amendment in Wisconsin. A legislator has proposed legislation that would amend Article I, Section 1, of the Wisconsin Constitution to include the unborn in the definition of “people” and “person.” This proposed amendment is not worded in such a way as to, nor is it intended to, define personhood for purposes of the 14<sup>th</sup> Amendment of the U.S. Constitution.<sup>1</sup>

Below are the original and proposed versions of the constitutional provision in question:

#### Original

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.<sup>2</sup>

#### Proposed

Section 1: *All people are 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.*<sup>3</sup>

In Wisconsin Family Action’s (WFA) opinion, the proposed personhood amendment would not have the negative legal effects that those opposing this amendment have predicted. But the proposed amendment would also not have the legal effect of restricting abortions in any way, absent the overturning of *Roe*. Nonetheless, the proposed personhood amendment would give the unborn the same rights as persons born alive—limited, of course, by *Roe* and federal abortion case law. This alone is a huge victory for the unborn.

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<sup>1</sup> See Pro-Life Wisconsin, *Question & Answer: Personhood of the Preborn in Wisconsin—A Protective Constitutional Amendment*, at 1 (policy paper).

<sup>2</sup> WIS. CONST. art. I, § 1.

<sup>3</sup> See LRB 2859/1, 2011 Assembly Joint Resolution.

## Arguments supporting a personhood constitutional amendment

1. *The pro-life movement needs to rethink pro-life strategy because the current strategy of relying solely on the incremental approach to eliminate abortions does not prevent abortion on demand and does not allow states to fully recognize the unborn as persons with the same rights as those who are born, to the extent allowed by the federal constitution.*

Conclusion: True

Supporters of a personhood amendment contend that now is the time to rethink pro-life strategy because the current “incremental” approach does not grant the unborn personhood status and “offers no plan or promise of ending abortion in the foreseeable future.”<sup>4</sup>

The incremental approach to eliminating abortions in this country has not allowed society to fully recognize that life begins at conception and that a complete definition of “person” includes the unborn. Recognition of personhood for the unborn is extremely important because it allows society to recognize the very foundational truth of the pro-life movement—that an unborn child is a human being that should be granted the full legal protection afforded to persons who are born.<sup>5</sup> Once *Roe* is no longer law, a personhood amendment would allow the state to ban abortion.<sup>6</sup> In the meantime, the proposed amendment would allow the citizens of Wisconsin to “bring into the Wisconsin Constitution a true definition of human life as endorsed by Wisconsin citizens speaking through the amendment process.”<sup>7</sup> Supporters of the proposed amendment believe that “[s]uch a definition is indispensable to spreading the protective cover of Wisconsin’s constitution over all of its citizens.”<sup>8</sup>

The incremental approach as the sole strategy to eliminating abortions in this country is also ineffective because it still allows a woman to obtain an abortion on demand. In *Roe*, the U.S. Supreme Court relied on a strict trimester approach to determine when a woman could

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<sup>4</sup> Robert Muise, Thomas More Law Society, *Rethinking Pro-Life Strategy—The Human Life Amendment*, at 1. One example those frustrated with the incremental strategy highlight as a flaw with only pursuing an incremental strategy is the ban on partial birth abortion. The pro-life movement celebrated the federal ban on partial birth abortion as a huge success for the movement. The saving of even one unborn baby is a huge success that should not go unnoticed. But partial-birth abortion bans regulate only one type of procedure—a procedure that is rarely used. Therefore, the pro-life movement spent countless hours, resources, and money on enacting and then litigating the constitutionality of a statute that would likely not save one baby. For a further discussion of this point, see Robert J. Muise, Memorandum to All Concerned Pro-Life Supporters Regarding Response to Bopp and Coleson Memo of August 7, 2007 Regarding Pro-Life Strategy, Sept. 24, 2007, [http://www.thomasmore.org/downloads/sb\\_thomasmore/ResponseMemo--09-24-07.pdf](http://www.thomasmore.org/downloads/sb_thomasmore/ResponseMemo--09-24-07.pdf).

<sup>5</sup> See Pro-Life Wisconsin, *Question & Answer: Personhood of the Preborn in Wisconsin—A Protective Constitutional Amendment*, at 1 (policy paper).

<sup>6</sup> See *id.* (“We recognize that [the amendment’s] 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.”).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

obtain an abortion and when the state could regulate abortion.<sup>9</sup> But in *Planned Parenthood v. Casey*, the Supreme Court rejected this trimester framework while upholding the essential holding in *Roe* that a woman had the right to abort her child.<sup>10</sup> In *Casey*, the Supreme Court adopted an “undue burden” test. Under this test “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability*.”<sup>11</sup> The Court also held that after viability, in accordance with *Roe*, the state may regulate or prohibit abortion except when it is necessary to protect the life or health of the mother.<sup>12</sup>

The life and health exception in *Casey* essentially allows abortion on demand both prior to and after viability. Physicians can conclude that every pregnancy jeopardizes the life of the woman. Further, the health exception created by the Supreme Court is so large that almost anything can fall under it. In *Doe v. Bolton*,<sup>13</sup> a companion case to *Roe*, the Supreme Court stated that in determining the health of the woman:

[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.<sup>14</sup>

Abortion is essentially available on demand at any stage of a woman’s pregnancy given this definition of “health.”

Despite the fact that abortion is essentially on demand in this country, abortion statistics suggest that society may be becoming more pro-life. The statistics in Wisconsin indicate that the rate of abortions in this state has steadily declined since 1980, when the rate of abortions reached its peak. In 1980, there were 21,754 abortions performed in this state and the abortion rate was 20 abortions per 1,000 women.<sup>15</sup> In 2010, there were 7,825 abortions performed in this state and the abortion rate was 7 abortions per 1,000 women.<sup>16</sup> These figures indicate that there has been

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<sup>9</sup> Under *Roe*, a woman could abort her unborn child without any restraints during the first trimester of pregnancy. 410 U.S. 113 (1973). During the second trimester, before the unborn child reaches viability, the state could only place restrictions on abortion to protect the health of the mother—the state cannot prohibit abortion of the unborn child. *Id.* at 163 (explaining that the state can regulate the “abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health”). Once the unborn child has reached viability, the state could restrict abortion, provided that the abortion is necessary to preserve the life or health of the woman. *Id.* at 163-64.

<sup>10</sup> 505 U.S. 833, 878 (1992).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 879.

<sup>13</sup> 410 U.S. 179 (1973).

<sup>14</sup> *Id.* at 192.

<sup>15</sup> Wisconsin Department of Health Services, Division of Public Health, *Reported Induced Abortions in Wisconsin*, Sept. 2011, at 4, <http://www.dhs.wisconsin.gov/publications/P4/P45360-10.pdf>.

<sup>16</sup> *Id.*

a 65 percent decrease in the rate of abortions in this state over the last 30 years. Several factors likely contributed to this decrease: (1) teenage pregnancies in Wisconsin have decreased nearly 27 percent since 1980 likely because more teenagers are choosing to abstain from sexual intercourse; (2) Wisconsin's fertility rate has been steadily decreasing for the last few decades; (3) regulations on abortions are deterring women from having abortions;<sup>17</sup> and (4) society is becoming more pro-life—which is evidenced by the increasing percentage of people who believe abortion is immoral, as measured by public opinion polls.<sup>18</sup>

At a minimum, these figures suggest that the incremental approach is working to some degree. Because *Roe* remains law, it is possible that the incremental approach is currently the best option for reducing abortions. But all who support the pro-life cause recognize that even one aborted child is one too many. And the fact that 7,825 abortions occurred in this state alone last year indicates that far too many unborn children are dying while the pro-life movement continues to engage solely in an incremental approach.

In sum, the current strategy of relying *solely* on the incremental approach to eliminating abortions in this country has its limitations. While the proposed personhood amendment would not result in an outright elimination of abortion on demand, it would at least allow Wisconsin to fully recognize the unborn as persons in our state constitution. WFA contends that both the incremental approach *and* the personhood amendment should be utilized; they are not mutually exclusive. Rather, they together strengthen the pro-life position and the ultimate goal of the protection of human life.

2. *The proposed personhood amendment seeks to bring into the Wisconsin Constitution a true definition of human life—one that includes the unborn.*

Conclusion: True

Currently the definition of “person” within the Wisconsin Constitution does not include the unborn. Instead the definition of “person” only applies to persons who are born.<sup>19</sup> The proposed personhood amendment would remedy this shortcoming of the state constitution by proclaiming this state's recognition that an unborn child is no less of a person than one who is born and therefore the unborn are entitled to the same rights as those who are born. Finally, the proposed amendment would further the agenda of the pro-life movement by informing society that the citizens of Wisconsin recognize that life begins at conception and that this state should continue to further the goal of ending abortion.

The opposition to this amendment contends that this proposed amendment would lead to costly litigation, asserting that legal experts advise that a personhood amendment would be

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<sup>17</sup> Recent social science research suggests that state-level abortion restrictions are decreasing state abortion ratios and rates. See Michael J. New, *Analyzing the Effects of Anti-Abortion U.S. State legislation in the Post-Casey Era*, 11 STATE POLITICS & POL. Q. 28 (2011), available at <http://downloads.frc.org/EF/EF11C45.pdf>.

<sup>18</sup> See *infra* p. 16-17.

<sup>19</sup> See WIS. CONST. Art. I, Sec. 1 (“All people *are born* equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness . . . .”) (emphasis added).

challenged in federal court and struck down.<sup>20</sup> But WFA believes, based on sound legal advice, that U.S. Supreme Court precedent and principles of federal jurisdiction and standing indicate that a challenge in federal court by the opposition would be ill-advised and would probably not succeed. We place the caveat of “probably” on this statement because anything can happen when a case falls before an activist judge. We conclude the amendment is constitutional for two reasons: (1) states are free to make a policy judgment about when life beings as long as the state does not use this judgment to justify abortion regulations that would otherwise be unconstitutional, and (2) citizens lack standing to facially challenge a personhood amendment.<sup>21</sup>

a) States are free to make policy judgments about when life begins

Wisconsin would be making a policy judgment about when life begins if the proposed personhood amendment passed. The U.S. Supreme Court concluded in *Webster v. Reproductive Health Services* that states are free to make policy judgments about when life begins as long as they do not use this judgment to justify abortion regulations that would otherwise be unconstitutional.<sup>22</sup> Consequently, when states make these value judgments and are not seeking to justify unconstitutional abortion regulations, it is not the Supreme Court’s role to determine the constitutionality of this judgment.<sup>23</sup>

In *Webster*, the Supreme Court considered whether the first provision (the preamble) of an abortion statute that defined human life as beginning at conception violated the federal constitution.<sup>24</sup> The provision also stated that “unborn children have protectable interests in life, health, and well-being” and mandated that state laws be interpreted to provide unborn children with “all the rights, privileges, and immunities available to other persons, citizens, and residents of this state,” subject to the U.S. Constitution and the Supreme Court’s precedent.<sup>25</sup> The Supreme Court concluded that because the preamble did not regulate abortion or any aspect of the abortion procedure but merely expressed a value judgment—something a state is permitted to do—it was not in a position to determine the provision’s constitutionality.<sup>26</sup>

The opposition may rely on the Supreme Court’s dictum in *Akron v. Akron Center for Reproductive Health, Inc.*, to support its contention that “a State may not adopt one theory of

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<sup>20</sup> Wisconsin Right to Life, *Why the Personhood Amendment is Wrong for Wisconsin*, available at <http://www.wrtl.org/pdf/PersonhoodFlier.pdf>.

<sup>21</sup> Standing doctrine would not preclude opponents from making as-applied challenges to the amendment. But as discussed later in this section, it would be nearly impossible for someone to make an as-applied challenge to this amendment because the state, for example, would have to criminally charge someone for performing an abortion or procuring an abortion and the state would have to rely on this amendment as justification for the charge. But given the existence of *Roe* and the fact that federal law is supreme to state law under the Supremacy Clause of the U.S. Constitution, it would be difficult to find a prosecutor who would do this.

<sup>22</sup> 492 U.S. 490, 504-05 (1989)

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* The Supreme Court also discussed in *Webster* other issues not relevant here.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* (“We therefore need not pass on the constitutionality of the Act’s preamble.”).

when life beings to justify its regulation of abortions.”<sup>27</sup> But the Supreme Court clarified this statement in *Webster*. In *Webster*, the Supreme Court emphasized that a state could express a value judgment about when life begins as long as the state does not use this value judgment to justify an abortion regulation that would otherwise be unconstitutional.<sup>28</sup> The Supreme Court also stated that *Roe* “implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.”<sup>29</sup>

Nonetheless, the opposition will contend that the purpose of the proposed personhood amendment is to justify a ban on abortion.<sup>30</sup> But the proposed amendment merely expresses a value judgment about when life begins and is not intended to prohibit abortion in this state while *Roe* is still the law. The proposed amendment does not justify an abortion regulation that would otherwise be unconstitutional or any other action, for that matter. The amendment is “abortion-neutral” and “merely determines when life begins in a non-abortion context, a traditional state prerogative.”<sup>32</sup> This amendment imposes no substantive restrictions on abortion.<sup>33</sup>

Further supporting the conclusion that the proposed amendment is constitutional is the principle that when a state court has never applied a provision of state law, only state courts can determine how this provision might be used to interpret other state statutes.<sup>34</sup> This principle

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<sup>27</sup> 462 U.S. 416, 444 (1983) (citing *Roe v. Wade*, 410 U.S. at 159-62) (argument raised in the opinion by the majority’s decision in *Webster* by the Court of Appeals for the Eighth Circuit). The facts in *Akron* are fundamentally different than the facts in *Webster*. In *Akron*, the state had a theory that life began at conception, and therefore they used this theory to justify a regulation on abortion. This regulation required a physician to inform their patient “the unborn child is a human life from the moment of conception.” *Akron*, 462 U.S. at 444. In *Webster*, the Legislature merely made a policy decision that human life began at conception, and this policy decision was set forth in its abortion statute. Missouri did not use this policy, though, to justify its regulation on abortion. Instead, Missouri continued to uphold the essential holding in *Roe*.

<sup>28</sup> *Webster*, 462 U.S. at 506.

<sup>29</sup> *Maher v. Roe*, 432 U.S. 464, 474 (1977) (quoted in *Webster*, 462 U.S. at 506).

<sup>30</sup> See *Webster*, 462 U.S. at 506 (explaining a similar argument made by Reproductive Health Services in opposition to the preamble).

<sup>32</sup> See *id.* at 505 (explaining a similar argument made by the state of Missouri in *Webster* when it asserted that its preamble did not violate the federal constitution).

<sup>33</sup> *Id.* This argument was made by the state of Missouri to defend its preamble that made a policy judgment about when life began.

<sup>34</sup> *Id.* (explaining that when a state makes a value judgment and places that value judgment into law, *only* state courts can determine the extent to which the language of the law “might be used to interpret other state statutes or regulations”). The Court held in *Alabama State Federation of Labor v. McAdory*:

We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure.

325 U.S. 450, 460 (1945).

therefore further undermines the opposition’s conclusion that the proposed amendment will be challenged in federal court and struck down. Instead, a *state* court should determine whether a personhood amendment would be used to interpret section 640.15—the current abortion statute that is in conformity with *Roe*—or any other state statute.

Finally, federal courts will not determine whether this proposed amendment, on its face, could violate federal law because federal courts are “not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.”<sup>35</sup> In sum, only if the state uses the amendment to prohibit abortion or some other activity that is protected by federal and state law will a court entertain a challenge to the proposed amendment.

b) Standing concerns for opposition

It does not appear that anyone has standing to challenge the proposed personhood amendment because the proposed amendment does not impose any substantive restrictions or requirements. Under current standing doctrine, a claimant must first demonstrate an “injury in fact” resulting from the action which they seek to have the court adjudicate.<sup>36</sup> An “injury in fact” is an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>37</sup> Claimants have the burden of proving they have standing.

There are two types of standing challenges—facial challenges and as-applied challenges. Under a facial challenge, the claimant must establish beyond a reasonable doubt that no set of circumstances exist under which the amendment would be valid.<sup>38</sup> Facial challenges are very difficult challenges to win because the claimant must overcome a presumption of constitutionality.<sup>39</sup> As-applied challenges are different from facial challenges because under these challenges the claimant must merely prove that the amendment is unconstitutional as applied to them under their unique set of circumstances.

A claimant would not likely have standing to facially challenge a personhood amendment because they could not demonstrate an actual or imminent injury resulting from the amendment. This is because a claimant could not demonstrate that the amendment prevented them from obtaining an abortion (or engaging in any other protected action) since the amendment provides no substantive restrictions on abortion or any other action. Instead, a challenge to the amendment would be merely “conjectural or hypothetical.”

In theory, it could be possible for someone to raise an as-applied challenge to the proposed personhood amendment. But even that possibility would be very remote. Only if the

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<sup>35</sup> *Tyler v. Judges of Court Registration*, 179 U.S. 405, 409 (1900).

<sup>36</sup> *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

<sup>37</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>38</sup> *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

<sup>39</sup> *See Salerno*, 481 U.S. at 745; *State v. Cole*, 264 Wis. 2d 520, 531 (2003).

state uses the amendment to justify through legislation, for example, a ban or regulation on abortion or some other activity that is protected by federal law could a court entertain a challenge to the proposed amendment. And even then, only the specific state action would be subject to challenge—not the entire amendment.<sup>40</sup>

3. *A constitutional amendment rather than a statutory change is necessary.*

Conclusion: True

Finally, a constitutional amendment rather than a statutory change is necessary. If our state constitution’s definition of “person” includes the unborn, then it would be difficult for the Wisconsin Supreme Court to conclude that our state constitution includes a right to abortion. If *Roe* is overturned, the question of whether abortion is legal is returned to the states. Even if a statute existed that banned abortion, the Wisconsin Supreme Court could conclude that the state constitution, without a personhood amendment, protects the right to abortion. But this would be extremely difficult with a personhood amendment in the state constitution.

### **Arguments opposing a personhood constitutional amendment**

1. *A personhood amendment would repeal the current abortion ban in Wisconsin and current state regulations on abortion.*

Conclusion: False

Opponents to Wisconsin’s proposed personhood amendment assert that legal experts have advised that the proposed personhood amendment would repeal Wisconsin’s current abortion ban and abortion regulations.<sup>41</sup> Therefore, upon *Roe*’s reversal Wisconsin would not

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<sup>40</sup> Another remote possibility would require a district attorney who is determined to test the limits of an enacted personhood amendment to charge a doctor with performing an abortion on an unborn child pre-viability. The district attorney would have to use the amendment to justify its charging decision. The doctor would subsequently file a motion to dismiss the charge, claiming that the charge violates *Roe* as applied to him. The doctor would have standing because he would have an injury—being criminally charged with a crime. Even then the possibility of a district attorney using this amendment to charge a doctor with abortion would be remote to obsolete because the district attorney would be violating the federal constitution—a law he swore to uphold when he took his oath of office—if he charged a doctor with performing an abortion.

There might be other situations in the civil context where an as-applied challenge to the personhood amendment might be entertained by a court. For example, a father might claim that he has standing to sue for wrongful death if the mother aborts the child at any time because an enacted personhood amendment would recognize his unborn child as a person. In this situation, the doctor (or maybe even the mother if she is sued) could then challenge the constitutionality of an enacted personhood amendment as applied to them as a defense. But it is unclear what the relationship would be between civil causes of action and abortion jurisprudence. Nonetheless, even if these as-applied challenges have merit, they would not invalidate the entire personhood amendment. They would only invalidate the amendment as applied to a *specific* situation.

<sup>41</sup> Wisconsin Right to Life, *Why the Personhood Amendment is Wrong for Wisconsin*, available at <http://www.wrtl.org/pdf/PersonhoodFlier.pdf>.

have a statute banning abortion. But this assertion requires two assumptions: (1) that Wisconsin currently has a statute that prohibits abortion (and is only ineffective because of *Roe*); and (2) that a constitutional amendment supersedes and therefore invalidates any existing statutes that involve subject matter that relate to the amendment. Opponents have provided no legal support for their assertion that a personhood amendment would repeal this state's abortion ban and abortion regulations. WFA concludes that a personhood amendment would not repeal any state abortion ban or abortion regulations because of the current abortion law in this state and principles of statutory construction.

a) Current abortion law in Wisconsin

Two statutes in the Wisconsin criminal code refer to abortion. These statutes are sections 940.04 (enacted pre-*Roe*) and 940.15 (enacted post-*Roe*). The opposition contends that section 940.04 bans abortion and asserts that section 940.04 would take effect upon the reversal of *Roe*. This is important because the opposition strongly contends that a personhood amendment would invalidate section 940.04. For reasons discussed below, it appears that section 940.04 is likely not effective anymore at criminalizing abortion upon reversal of *Roe* because section 940.04 is not effective as an abortion statute.

The Legislature enacted Section 940.04 in 1953 as a re-codification of three abortion statutes dating back to the late 1800s. Subdivisions 1 and 2 provide that anyone other than the mother who intentionally kills an unborn child or an unborn viable child is guilty of a felony.<sup>42</sup> Subdivisions 3 and 4 provide that a pregnant woman who intentionally kills her unborn child or unborn viable child is guilty of a crime.<sup>43</sup> This section defines an “unborn child” as “a human being from the time of conception until it is born alive.”<sup>44</sup> This section does not apply to abortions that are performed to save the life of a mother.<sup>45</sup>

The Legislature enacted section 940.15 in 1985 to conform to *Roe* and *Bolton*.<sup>46</sup> This section makes performing an abortion on a “fetus” or “unborn child” after it reaches viability a felony.<sup>47</sup> The section defines viability as the stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.<sup>48</sup> This section has an exception. A physician may perform an abortion

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<sup>42</sup> Wis. Stat. § 640.04, subds. (1)-(2) (2009-10).

<sup>43</sup> *Id.*, subds. (3)-(4).

<sup>44</sup> *Id.*, subd. (6).

<sup>45</sup> *Id.*, subd. (5).

<sup>46</sup> Wis. Stat. § 940.15 (2009-10). There is also an abortion exception in Section 940.13. This section states, “No fine or imprisonment may be imposed or enforced against and no prosecution may be brought against a woman who obtains an abortion or otherwise violates any provision of any abortion statute with respect to her unborn child or fetus . . . .” The Wisconsin Legislature enacted this exception in 1985. 1985 Wis. Act 56.

<sup>47</sup> Wis. Stat. § 940.15, subds. (2), (5).

<sup>48</sup> *Id.*, subd. (1).

if the abortion is necessary to preserve the life or health of the woman, as determined by the reasonable medical judgment of her physician.<sup>49</sup>

It appears that section 940.04 would be ineffective as a ban on abortion upon the reversal of *Roe* because it would likely be construed as a feticide statute. The Wisconsin Supreme Court essentially rendered Section 940.04 ineffective as an abortion statute in *State v. Black*.<sup>50</sup> In *Black*, the defendant was charged under section 940.04, subdivision 2(a), for killing his unborn child after striking his pregnant wife in her abdomen.<sup>51</sup> The defendant asserted that he could not be charged under subdivision 2(a) because (1) the subdivision only applies in the context of consensual medical abortions and (2) the subdivision was repealed by implication through the enactment of section 940.15.<sup>52</sup>

The court concluded that subdivision 2(a) is not an abortion statute, but rather a feticide statute.<sup>53</sup> The court held that the language of subdivision 2(a), clearly and unambiguously prohibits the “intentional destruction” of a viable unborn child.<sup>54</sup> Subdivision 2(a) is therefore a feticide statute even though the title of the statute states “abortion.”<sup>55</sup> The court did not use the title of the statute to assist in its interpretation of subdivision 2(a) because there was no doubt as to the meaning of the statute.<sup>56</sup> The court also clearly indicated that this case was not about abortion rights. The court stated: “We begin by underscoring what this case is not. This is not an abortion case in the sense of *Roe v. Wade*. . . . Further, this is not a case about when an unborn child ‘quickens’ or becomes ‘viable.’ This is a case about feticide.”<sup>57</sup>

The court also concluded that subdivision 2(a) was not repealed by implication through the enactment of section 940.15.<sup>58</sup> The Legislature did not repeal subdivision 2(a) when it enacted section 940.15.<sup>59</sup> Therefore two statutes—sections 940.04 and 940.15—that were similar in nature were enacted laws. But the court stated, “[W]hen two provisions are similar, as arguably are [sections] 940.04(2)(a) and 940.15 . . . we must make every attempt to give effect to both by construing them together so as to be consistent with one another.”<sup>60</sup> This construction is consistent with the principle of statutory construction that if there is a potential conflict between statutes, courts will read the statutes to avoid such a conflict if a reasonable construction allows

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<sup>49</sup> *Id.*, subd. (2)

<sup>50</sup> 188 Wis.2d 639, 526 N.W.2d 132 (Wis. 1994).

<sup>51</sup> *Id.* at 642-43.

<sup>52</sup> *Id.* at 644-45.

<sup>53</sup> *See id.* at 645. The court stated that they were only addressing subdivision 2(a) and would make no attempt to construe any other subdivisions in section 940.04. *Id.* at 647 n. 2.

<sup>54</sup> *Id.* at 645.

<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

<sup>57</sup> *Id.* at 644.

<sup>58</sup> *See id.* at 645-46.

<sup>59</sup> *Id.* at 645.

<sup>60</sup> *Id.*

this reading.<sup>61</sup> The court concluded that in “order to construe [sections] 940.04(2)(a) and 940.15, consistently, we view each statute as having a distinct role”<sup>62</sup> Section 940.15 is a consensual abortion statute because it discusses “an abortive type procedure.”<sup>63</sup> On the other hand, subdivision 2(a) is not an abortion statute because it merely “proscribes the intentional criminal act of feticide: the intentional destruction of an unborn quick child presumably without the consent of the mother.”<sup>64</sup>

By analogy, a court would almost certainly interpret the other subdivisions of section 940.04 as feticide statutes instead of abortion statutes.<sup>65</sup> For this reason, a personhood amendment would not invalidate existing abortion laws in Wisconsin because section 940.04 is not effective as an abortion statute. Therefore there would not be any concern that a personhood amendment would invalidate any abortion ban currently in Wisconsin statute.

Even assuming that Wisconsin does have an abortion ban and *Roe* is reversed, section 940.15 would still be good law.<sup>66</sup> Therefore, section 940.15 would have to be repealed before abortion would be entirely banned in Wisconsin because section 940.15 allows a doctor to

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<sup>61</sup> *Id.* at 645-46; *see also* *Wyss v. Albee*, 532 N.W.2d 444, 447 (1995) (“If the potential for conflict between the statutes is present, we will read the statutes to avoid such conflict if a reasonable construction so permits.”).

<sup>62</sup> 188 Wis.2d at 646.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> The plain meaning of the statute indicates that section 940.04 is an abortion statute—it is meant to criminalize the performance of abortions. But at the same time, section 940.15 allows abortion in certain circumstances. Therefore, because these unambiguous statutes conflict, under principles of statutory construction, the court had to reconcile these two statutes in a way that gave effect to both statutes since the Legislature did not repeal section 940.04 when it enacted 940.15.

Nonetheless, for informative purposes, the legislative history of section 940.04 indicates that at one time, it did have the effect of criminalizing abortion prior to *Roe* and the enactment of section 940.15. The Legislature enacted section 940.04 as an abortion law in 1953 and the law took effect in 1955. The comments to the statute stated that the section “penalizes the person who performs an abortion on another” and that the section provides heightened penalties if the mother dies from the “operation.” 188 Wis.2d 639, 653-54 (Heffernan, C.J., dissenting) (citing *Wisconsin Legislative Council Judiciary Committee Report on the Criminal Code, Comment 66, 67* (1953)). The use of the words “perform” and “operation” strongly indicate that the statute refers to a medical procedure, not feticide. *See id.* A legislative staff attorney also referred to the statute as an abortion statute, stating in a memo that statute was unconstitutional after *Roe*. *See id.* at 656 n.7 The state Attorney General at the time also sent a memo to all county district attorneys stating, “It is my opinion that these decisions have effectively rendered unconstitutional and unenforceable the Wisconsin abortion statute, sec. 940.04, Stats., in its entirety.” *See id.* at 657 n. 8.

<sup>66</sup> For example, in *Black*, the court stated, “any attempt to apply [section 940.04, subdivision 2(a)] to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it.” *See id.* at 646 (majority opinion).

perform an abortion to protect the life and health of the mother. This is an expansive exception that would still allow abortion to be obtained on demand.<sup>67</sup>

But if a personhood amendment were enacted, then section 940.15 could be held unconstitutional because it violates an unborn child's right to life. Until then, without a personhood amendment, section 940.15 is what governs abortion in Wisconsin.

b) Principles of statutory construction

Opponents contend that the proposed personhood amendment would invalidate section 940.04 and this state's abortion regulations. Wisconsin has several laws that regulate abortion and protect those who refuse to participate in performing abortions. These laws include parental consent for minors seeking an abortion,<sup>68</sup> limits on public funding of abortions,<sup>69</sup> protections for hospital employees who refuse to participate in abortions,<sup>70</sup> and voluntary and informed written consent of the mother 24 hours before the abortion, except in cases of emergency, sexual assault and incest.<sup>71</sup> These abortion regulations and any statute that would ban abortion would not be invalidated by the proposed amendment. Under principles of statutory construction, a statute that preceded a constitutional amendment is presumed to be constitutional and not invalidated by the amendment as long as the two do not conflict.

The Wisconsin Supreme Court discussed this principle of statutory construction in *State v. Cole*.<sup>72</sup> In *Cole*, the court reaffirmed the principle that a statute is presumed to be constitutional and that this presumption does not depend on whether the statute predates or postdates a constitutional amendment.<sup>73</sup> The court stated that in determining "[w]hether a statute predates or postdates a constitutional amendment, the legislature is still the more appropriate body for those considerations, and the judiciary rightly presumes the legislature makes such an assessment."<sup>74</sup> Therefore, unless a conflict exists between the personhood amendment and an abortion regulation or ban, in which case the constitutional amendment would prevail, the statutes are presumed to be constitutional and in effect.

It is clear that the intent of this amendment is not to invalidate previous statutes regarding abortion and abortion regulations. Consequently, barring any conflict between the proposed amendment and existing abortion regulations—a conflict that does not seem to exist—a court

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<sup>67</sup> See Wis. Stat. § 940.15, subd. 3 (2009-10) ("Subsection (2) does not apply if the abortion is necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician.").

<sup>68</sup> Wis. Stat. § 48.375, subd. 4 (2009-10).

<sup>69</sup> Wis. Stat. §§ 20.927, 59.53 (13) and 66.04 (1m) (2009-10).

<sup>70</sup> See Wis. Stat. § 253.09 (2009-10).

<sup>71</sup> Wis. Stat. § 253.10, subd. 3 (2009-10).

<sup>72</sup> 264 Wis.2d 520, 532 (2003).

<sup>73</sup> 264 Wis.2d 520, 532 (2003).

<sup>74</sup> *Id.*

would presume that these existing statutes are constitutional and the enactment of a personhood amendment would not invalidate them.

2. *The proposed personhood amendment would not protect unborn children.*

Conclusion: False

Some opponents of the proposed personhood amendment contend that the amendment would not prevent a single abortion from occurring.<sup>75</sup> It is true that the proposed amendment would not ban abortion in Wisconsin until *Roe* is no longer law. But it is not true that the proposed amendment would not prevent a single abortion. The culture in this country towards abortion has changed for the better over the last three decades. This is due largely to the pro-life movement's success of changing our country's attitudes about abortion. It would appear that a personhood amendment could also help further change these attitudes, which would mean that fewer women would be aborting their unborn children.

3. *Should the proposed personhood amendment succeed, expert national and state legal authorities believe it would be challenged in court and struck down.*

Conclusion: False

Opponents assert that if the proposed personhood amendment is enacted in this state, a federal district court would invalidate the amendment, a federal appellate court would affirm this decision, and the state would have to pay the attorney fees for the pro-abortion plaintiff who brought the claim.<sup>76</sup> We believe, as discussed above, that the proposed personhood amendment is constitutional for two reasons: (1) states are free to make a policy judgment about when life beings as long as the state does not use this judgment to justify abortion regulations that would otherwise be unconstitutional, and (2) opponents to the amendment lack standing to facially challenge a personhood amendment. For these reasons, it is unlikely that any challenge to this amendment would be successful.<sup>77</sup>

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<sup>75</sup> Wisconsin Right to Life, *Why the Personhood Amendment is Wrong for Wisconsin*, available at <http://www.wrtl.org/pdf/PersonhoodFlier.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> Some contend that if the U.S. Supreme Court did take an abortion case, they would use it as an opportunity to apply equal protection analysis instead of substantive due process analysis to decide the case. James Bopp, Jr. & Richard E. Coleson, Memorandum on Pro-Life Strategy Issues, Aug. 7, 2007, <http://operationrescue.org/pdfs/Bopp%20Memo%20re%20State%20HLA.pdf>. Such a move could invalidate state abortion regulations and make the constitutional right to obtain an abortion even stronger. WFA does not believe this argument has merit. Nonetheless, WFA does not believe the Supreme Court would take this case because as explained previously, there are no grounds for the court to adjudicate this case. But in the interest of completeness, if one were interested in the merits of this argument, WFA refers one to a memo written by Robert J Muise, of the Thomas More Law Center. He discusses the merits of this argument on pages 7-8 and footnotes 9 and 10. See Robert J. Muise, Thomas More Law Center, Memorandum to All Concerned Pro-Life Supporters Regarding Response to Bopp and Coleson Memo of August 7, 2007 Regarding Pro-Life Strategy, Sept. 24, 2007, [http://www.thomasmore.org/downloads/sb\\_thomasmore/ResponseMemo--09-24-07.pdf](http://www.thomasmore.org/downloads/sb_thomasmore/ResponseMemo--09-24-07.pdf). In brief, WFA believes that Muise is correct to assert that the Supreme Court would not likely analyze abortion cases under an equal protection analysis.

4. *A personhood amendment would not present a united front to the opposition.*

Conclusion: Possibly

Currently, the pro-life movement is divided in its support for personhood amendments. The pro-abortion movement could use this division to further their arguments for why a personhood amendment is not right for Wisconsin. In Wisconsin, Wisconsin Right to Life opposes the proposed amendment while Pro-Life Wisconsin supports it. The Wisconsin Catholic Conference may decide to neither support nor oppose the amendment. It would seem that the Catholic Conference would take its cue from Catholic conferences around the country. These conferences have either decided not to take a position on the amendment or have outright opposed it. It appears that these conferences are taking their lead from the National Right to Life Committee, who is advised by attorney James Bopp, Jr.—author of the “Bopp memo”—who opposes such amendments. In addition to these organizations, Americans United for Life also opposes a personhood amendment.

Despite these opponents, there is increasing support for these amendments from other sources. A prominent pro-life, Catholic professor who teaches at Notre Dame Law School, Charles Rice, has been a huge proponent of state personhood amendments.<sup>78</sup> Others who have given their support of personhood amendments include Tony Perkins, president of the Family Research Council, Richard Thompson, president and chief counsel of the Thomas More Law Center,<sup>79</sup> and Liberty Council, among many others.<sup>80</sup>

In sum, there is division among the pro-life movement about whether to pursue a personhood amendment. But just because there is division does not mean that the proposed personhood amendment is not worth putting forth to the voters of Wisconsin.

5. *The current political environment is not conducive to enacting a personhood amendment.*

Opponents of the personhood amendment contend that the current political environment is not ready to accept an absolute prohibition on abortion. Therefore, an incremental approach to eliminating abortion is the best solution. Attorney James Bopp, in a memo written to those interested in the personhood amendment movement, stated:

[T]he pro-life movement must at present avoid fighting on the more difficult terrain of its own position, namely arguing that abortion should not be available in cases of rape, incest, fetal deformity, and harm to the other. While restricting abortion in these situations is morally defensible, public opinion polls show that popular support for the pro-life side drops off dramatically when these “hard” cases are the topic.<sup>81</sup>

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<sup>78</sup> For a list of pro-life leaders, legal advocates, politicians, governing officials, medical and scientific endorsements, pro-family leaders, see Personhood, *Advocates of Personhood*, [http://personhood.net/index.php?option=com\\_content&view=article&id=213&Itemid=629](http://personhood.net/index.php?option=com_content&view=article&id=213&Itemid=629) (last visited Oct. 27, 2011).

<sup>79</sup> See Georgia Right to Life, available at <http://www.grtl.org/?q=node/93>.

<sup>80</sup> See *supra* n. 82.

<sup>81</sup> James Bopp, Jr. & Richard E. Coleson, Memorandum on Pro-Life Strategy Issues, Aug. 7, 2007, <http://operationrescue.org/pdfs/Bopp%20Memo%20re%20State%20HLA.pdf>.

Our research was not able to find public opinion polling data on abortion for Wisconsin specifically. But it appears that in the last decade, the percentage of those believing that abortion is morally wrong has increased nationally.

Gallup Poll—Public Opinion of Morality of Abortion Between 2001 and 2010<sup>82</sup>

Date	Morally Acceptable	Morally Wrong	Depends on Situation
5/3-6/10	38%	50%	9%
5/7-10/09	36%	56%	6%
5/8-11/08	40%	48%	10%
5/10-13/07	40%	51%	7%
5/8-11/06	43%	44%	11%
5/2-5/05	40%	51%	8%
5/2-4/04	40%	50%	8%
5/5-7/03	37%	53%	9%
5/6-9/02	38%	53%	8%
5/10-14/01	42%	45%	11%

But public opinion is mixed about support for various abortion restrictions, suggesting that many still believe that there should not be obtrusive restrictions on a woman’s ability to obtain an abortion.

U.S Support for Specific Abortion Restrictions—July 15-17, 2011<sup>83</sup>

	Favor	Oppose
A law requiring doctors to inform patients about certain possible risks of abortion before performing the procedure	87%	11%
A law requiring women under 18 to get parental consent for any abortion	71%	27%
A law requiring women seeking abortions to wait 24 hours before having the procedure done	69%	28%
A law which would make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as a “partial birth abortion,” except in cases necessary to save the life of the mother	64%	31%
A law requiring women seeking an abortion to be shown an ultrasound image of her fetus at least 24 hours before the procedure	50%	46%
A law allowing pharmacists and health providers to opt out of providing medicine or surgical procedures that result in abortion	46%	51%
A law prohibiting health clinics that provide abortion services from receiving any federal funds	40%	57%

There is reason to believe that the citizens of Wisconsin are more likely to favor a personhood amendment because of the culture in this state compared to others, such as states on the coasts, which are more likely to favor abortion. Most obviously, the Wisconsin Legislature has already passed many of the restrictions discussed above.

<sup>82</sup> See Pollingreport.com, <http://www.pollingreport.com/abortion.htm> (last visited Oct. 27, 2011).

<sup>83</sup> Gallup Organization, *Common State Abortion Restrictions Sparks Mixed Reviews*, July 15-17, 2011, <http://www.gallup.com/poll/148631/common-state-abortion-restrictions-spark-mixed-reviews.aspx>.

On a political note, and putting abortion aside, the pro-abortion groups could attempt to scare women into thinking that the proposed personhood amendment will somehow ban contraception, given that most contraception can have abortifacient effects. The pro-abortion party in *Webster* made this argument as a reason to find the state's policy judgment that life begins at conception within an abortion statute unconstitutional. The party contended that such language would prevent physicians from dispensing certain forms of contraception, including intrauterine devices and the morning-after-pill.<sup>84</sup> The proposed personhood amendment would not allow the state to justify regulations on contraception, including the morning-after-pill, because the Supreme Court expanded the constitutional right to privacy in *Griswold v. Connecticut*,<sup>85</sup> *Eisenstadt v. Baird*,<sup>86</sup> and *Carey v. Population Services International* to include the use of contraception.<sup>87</sup> Nevertheless, any personhood amendment campaign would have to be aware that this argument could arise from the opposition and must address this concern accordingly.

In sum, there will be difficulty in passing a personhood amendment if society is not ready to accept that life begins at conception. However, the question really should be whether it is worth the risk to try enacting a personhood amendment right now. WFA believes it is worth the risk and that there probably hasn't been a better time to try in the last few decades, given that the number of people who consider themselves to be pro-life is increasing.

6. *The cost of enacting a personhood amendment is too expensive for the benefits realized.*

Conclusion: False

Opponents estimate that it would cost about \$4 million to succeed in passing a personhood amendment in Wisconsin.<sup>88</sup> While this figure has not been supported and may appear to be high, it is true that statewide referendum campaigns can be very expensive. Nonetheless, in addition to the monetary costs, there are also the political costs to consider.<sup>89</sup> A proposed constitutional amendment must pass two consecutive sessions of the Wisconsin Legislature before it can be placed on the ballot. Finally, there are the man-hours that must be

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<sup>84</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 505-06 (1989).

<sup>85</sup> 381 U. S. 479 (1965).

<sup>86</sup> 405 U. S. 438 (1972).

<sup>87</sup> 431 U. S. 678 (1977). The U.S. Supreme Court in *Planned Parenthood v. Casey* stated:

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.

505 U.S. 833, 853 (1992).

<sup>88</sup> See Wisconsin Right to Life, *Why the Personhood Amendment is Wrong for Wisconsin*, available at <http://www.wrtl.org/pdf/PersonhoodFlier.pdf>

<sup>89</sup> *See id.*

spent on passing this amendment. Despite these costs, the proposed personhood amendment has value because it would enshrine in our state constitution a policy judgment made by this state that life begins at conception and therefore the unborn are entitled to the same recognition as persons who are born—limited, of course, currently by *Roe* and federal abortion jurisprudence.

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