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If a Fetus Is a Person, It Should Get Child Support, Due Process, and Citizenship

Carliss N. Chatman*

Alabama has joined the growing number of states determined to overturn *Roe v. Wade* by banning abortion from conception forward.¹ The Alabama Human Life Protection Act,² as the law is called, subjects a doctor who performs an abortion to as many as ninety-nine years in prison.³ The law has no exceptions for rape or incest.⁴ It redefines an “unborn child, child or person” as “[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability.”⁵

We ought to take our laws seriously. Under the laws, people have all sorts of rights and protections. When a state grants full personhood to a fetus, should they not apply equally?⁶

For example, should child support start at conception?⁷

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1. Alabama Human Life Protection Act, ALA. CODE § 26-23H-1 (2019).
2. *Id.*
3. *Id.* at § 26-23H-6.
4. *Id.* at § 26-23H-4.
5. *Id.* at § 26-23H-3.
6. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”). For an analysis of the Equal Protection Clause, see generally Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001).
7. *Child Support 101: Child Support Basics*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 2, 2012), <https://perma.cc/VYH5-6PLJ> (last visited Feb. 20, 2020) [hereinafter *Child Support Basics*] (on file with the Washington and Lee

Every state permits the custodial parent—who has primary physical custody of the child and is primarily responsible for his or her day-to-day care—to receive child support from the noncustodial parent.⁸ Because a fetus resides in its mother, and receives all nutrition and care from its mother’s body, the mother should be eligible for child support as soon as the fetus is declared a person—at conception in Alabama,⁹ six weeks in states that declare personhood at a fetal heartbeat, eight weeks in Missouri,¹⁰ but at birth in states that have not banned abortion.¹¹

And what about deportation?¹² Can a pregnant immigrant who conceived her child in the United States be expelled?¹³ Because doing so would require deporting a U.S. citizen.¹⁴ To

Law Review).

8. *Child Support Guideline Models by State*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 20, 2019), <https://perma.cc/VZL4-CJ7T> (last visited Feb. 20, 2020) [hereinafter *Child Support Models*] (on file with the Washington and Lee Law Review).

9. Alabama Human Life Protection Act, ALA. CODE § 26-23H-3 (2019).

10. MO. REV. STAT. § 188.056 (2019); Lindsey Bever, *Missouri Lawmakers Send Strict Antiabortion Bill to Governor, Joining Wave of Conservative States*, WASH. POST (May 17, 2019, 3:13 PM), <https://perma.cc/4CUC-UV6B> (last visited Feb. 20, 2020) (on file with the Washington and Lee Law Review).

11. *See, e.g.*, N.Y. PUB. HEALTH LAW, §§ 2599-aa, 2599-bb (McKinney 2019); H3391, 79th Or. Leg. Assemb., 2017 Reg. Sess. (Or. 2017) (addressing access to abortion); *People v. Belous*, 458 P.2d 194, 973 (Cal. 1969) (voiding California’s criminal abortion statute because it did not satisfy due process and improperly infringed on fundamental constitutional rights).

12. *See* 8 U.S.C. § 1325 (2012) (articulating the elements of unlawful entry by an alien).

13. 8 U.S.C. § 1101(a)(23) (“The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth, by any means whatsoever.”); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)

The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.

14. 8 U.S.C. § 1227.

determine the citizenship of a fetal person requires examination of Section One of the Fourteenth Amendment, which declares, “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹⁵ The word “born” was not defined by the drafters.¹⁶ Presumably, they intended the standard dictionary definition: brought forth by birth.¹⁷ Our dates of birth are traditionally when our lives begin; we do not celebrate our dates of conception or the date of our sixth week in utero.¹⁸ But in states

15. U.S. CONST. amend. XIV, § 1.

16. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court held that people of African descent were not American citizens—and never could become citizens, even through an act of Congress. Chief Justice Robert B. Taney wrote that the framers of the Constitution did not intend Black people to have equal rights. *Id.* (“[Black people were] regarded [by Whites] as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”). Similarly, the Chinese Exclusion Act prohibited Chinese workers from becoming citizens. *See* Act of May 6, 1882, Ch. 126, 22 Stat. 58 (1882). For the framers, citizenship was a matter of race, not birth.

17. *Born*, MERRIAM-WEBSTER, <https://perma.cc/M4J8-PPW4> (last visited Feb. 20, 2020) (“[B]rought forth by or as if by birth.”) (on file with the Washington and Lee Law Review).

18. There is no scientific definition, nor is there a universal religious definition, of when life begins. Compare Maureen L. Condit, *When Does Human Life Begin?: The Scientific Evidence and Terminology Revisited*, 8 U. ST. THOMAS J.L. & PUB. POL’Y 44, 74 (2013)

Modern scientific evidence demonstrates that the one-cell human embryo, or zygote, is formed at the instant of sperm-egg plasma membrane fusion . . . It immediately initiates a series of cellular and biochemical events that ultimately generate the cells, tissues and structures of the mature body in an orderly temporal and spatial sequence. The capacity to undergo development is a defining characteristic of a human organism at the beginning of life. . . . Ethical positions that deny the personhood of human being at all stages of life are logically inconsistent and scientifically unsound, in addition to having significant, negative implications for the ethical treatment of all human persons.

with Elissa Strauss, *When Does Life Begin? It’s Not So Simple*, SLATE (April 4, 2017, 5:55 AM), <https://perma.cc/L9QW-DBDA> (last visited Feb. 20, 2020)

In a number of religions, when an embryo or fetus becomes a person remains a mystery, something that occurs not in a single moment but in a series of moments, none necessarily more important than the

with abortion bans, “born” takes on new meaning.¹⁹ Now legislatures assign an arbitrary time during gestation to indicate when life, personhood and, presumably, the rights that accompany these statuses take hold.²⁰ This grant of natural personhood at a point before birth brings application of the Fourteenth Amendment into question and may thus give a fetus citizenship rights—but only in those states. There are no laws that allow the United States to deny citizenship rights to a natural-born citizen merely because they reside with, or in, a noncitizen.²¹

Detaining any person without arraignment or trial violates the Constitution and international human rights laws.²² A fetus has not committed a crime, not been arraigned or charged, not weathered a trial by a jury of its peers, not had the opportunity to confront its accuser.²³ These laws redefining personhood surely mean that a pregnant woman cannot be incarcerated, as doing so requires confining a second person without due process.²⁴

If personhood begins in utero, a fetus will need a name and a Social Security number to begin exercising private rights and using public resources.²⁵ A Social Security number is necessary to

next. . . . “Many scientists would say they don’t know when life begins. There are a series of landmark moments,” said Arthur Caplan, professor and founding head of the Division of Medical Ethics at New York University Langone Medical Center. “The first is conception, the second is the development of the spine, the third the development of the brain, consciousness, and so on.”

(on file with the Washington and Lee Law Review).

19. Alabama Human Life Protection Act, ALA. CODE § 26-23H-3 (2019). A Missouri law banned abortions after the eighth week of pregnancy. *See* MO. REV. STAT. § 188.056 (2019). The law did not go into effect. *See* *Reprod. Health Servs. of Planned Parenthood of St. Louis Region v. Parson*, 389 F. Supp. 3d 631, 640 (W.D. Mo. 2019) (prohibiting enforcement of pre-viability bans on abortion).

20. *See, e.g.*, MO. REV. STAT. § 188.026 (2019) (recognizing signs of life at eight-week gestational age).

21. *Supra* note 13 and accompanying text.

22. G.A. Res. 43/173, (Dec. 9, 1988) (providing principles for protections of all persons under any form of detention).

23. U.S. CONST. amend. VI.

24. U.S. CONST. amend. V.

25. U.S. SOC. SEC. ADMIN., PUB. NO. 05-10023, SOCIAL SECURITY NUMBERS FOR CHILDREN (2017) <https://perma.cc/6RMX-W8KT> [PDF].

claim a child on taxes.²⁶ It is also a requirement to act on behalf of a child privately, like opening a bank account, buying savings bonds, or obtaining insurance coverage.²⁷ Typically, parents apply for a Social Security number when they obtain a birth certificate, but if states declare that personhood begins at some earlier arbitrary point in time, they will need to provide evidence, perhaps through a life certificate, that this new person exists and resides in their state. Once the life is established, can a mother insure a six-week fetus and collect if she miscarries? Will the tax code be adjusted in these states to allow parents to claim their unborn children as dependents at conception?²⁸ If so, can a woman who suffers more than one miscarriage in a fiscal year claim all of her children?

Article I, Section Two of the Constitution requires a census every ten years to count all persons residing within the United States.²⁹ If a fetus is granted personhood, it should be included in the count. The census currently asks about the age and date of birth of each household resident.³⁰ Will it now include the date of conception in select states so that fetuses may be counted?³¹ In those states, there is the potential to unfairly skew census data and disproportionately apportion representatives and resources to those states.

These questions highlight the unintended and potentially absurd consequences of sweeping abortion bans.³² At the heart of

26. 26 U.S.C. § 152 (2012); 26 C.F.R. § 1.152-2 (2019).

27. See Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, 1118 (1970).

28. I.R.S., PUB. 501, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION (Jan. 13, 2020), <https://perma.cc/7RQT-BETB> [PDF].

29. U.S. CONST. art. I, § 2; 13 U.S.C. §§ 8(b), 131, 182 (authorizing the Secretary of Commerce to collect the census).

30. See U.S. Census 2020, U.S. DEP'T OF COMM., <https://perma.cc/RFY4-K4F5> [PDF].

31. *Id.*

32. See, e.g., Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 L. & ETHICS HUM. RTS. 189, 224 (2017) (“[O]nly in contexts that involve punishing women and regulating their bodies have legislatures sought to create a new, narrow legal standard that transforms the identities of embryos and fetuses and grants them legal rights.”); Michele Goodwin, *Fetal Protection Laws: Moral Panic*

the issue is how the Fourteenth Amendment's definitions of personhood and citizenship should be applied. States have been allowed to define the personhood of unnatural creatures—such as corporations—since very early in our nation's history.³³ In exchange for this freedom, states are not permitted to go back on their deal.³⁴ In other words, once personhood rights are granted, a state may not deny life, liberty or property without due process, nor may a state deny equal protection under the law. States have never had the right to define the personhood of people. This was a subject—influenced either by place of birth or by complying with immigration and naturalization requirements—for the Constitution and federal law. State grants of natural personhood challenge this norm.

When states define natural personhood with the goal of overturning *Roe v. Wade*,³⁵ they are inadvertently creating a system with two-tiered fetal citizenship.³⁶ This is because *Roe* and *Planned Parenthood v. Casey*³⁷ create a federal floor for access to the right to choose—a rule that *some* ability to abort a fetus exists in the United States. If these cases are overturned, that eliminates only the federal right to abortion

and the New Constitutional Battlefront, 102 CALIF. L. REV. 781, 875 (2014) (“[F]etal protection efforts . . . impose onerous burdens on the most vulnerable members of our society: pregnant women. These burdens emerge during pregnancy in some of the cruelest ways, invading their privacy, ignoring their confidence, trampling their autonomy, and imposing physically abusive norms on their bodies.”).

33. Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 818–19 (2018) (“As early as the 1800s, three distinct theories of the corporation could be found in American jurisprudence. Chief Justice John Marshall acknowledged corporate personhood rights under the artificial entity/concession theory, aggregate theory, and real entity theory.”).

34. Carliss N. Chatman, *Judgment Without Notice: The Unconstitutionality of Constructive Notice Following Citizens United*, 105 KY. L.J. 49, 63 (2016) (highlighting due process limitations that protect the rights of corporations).

35. 410 U.S. 113 (1973).

36. Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 724 (2011) (“This [tiered personhood] process of granting personhood categorizes and makes separate levels of legal personhood by excluding some, giving others some rights, and giving the most privileged full rights—or full political personhood.”).

37. 505 U.S. 833 (1992).

access. Overturning *Roe* would not prohibit a state from continuing to allow access. In a post-*Roe* world, in states like New York that ensure the right to choose through their constitutions and statutes, citizenship will begin at birth.³⁸ In states that move the line to define life as beginning as early as conception, personhood and citizenship will begin as soon as a woman knows she is pregnant.

Trying to define citizenship and personhood based on the laws of each state creates some far-fetched and even ridiculous scenarios. If we follow that logic, we will tie our Constitution into a knot no court can untangle.

38. N.Y. PUB. HEALTH LAW, §§ 2599-aa (McKinney 2019).