

# The Anti-Abortion Movement Has Been Pushing a “Fetal Personhood” Strategy – It’s Not What You Think.

## Fact Sheet #1 in “All Part of the Plan”: Why Those Opposed to Abortion Are Pursuing a Legal Strategy of Granting Rights to Embryos and Fetuses

Following the 2022 Supreme Court’s lawless decision in *Dobbs v. Jackson Women’s Health Organization* overturning the federal constitutional right to abortion, abortion has been wholly or severely restricted in states across the United States, particularly in southern states.<sup>1</sup> Now, anti-abortion advocates are working towards imposing a nationwide total abortion ban, eliminating legal access in every state. While anti-abortion advocates and policymakers pursue multiple strategies towards this goal, one strategy – the legal strategy to give rights to embryos and fetuses – has gained more visibility<sup>2</sup> and also more momentum.

For decades, anti-abortion extremists have tried to establish rights for fetuses and embryos under various laws and economic benefits, with the overall goal of securing a U.S. Supreme Court decision recognizing fetuses as people under the U.S. Constitution. If the Supreme Court were to rule that fetuses and embryos are protected by the U.S. Constitution, particularly the 14th Amendment,<sup>3</sup> such a ruling would override any federal or state laws protecting abortion and ultimately lead to a nationwide ban on abortion. Such a ruling could also have a range of other harmful impacts – including curtailing access to birth control, fertility care, and other pregnancy-related care OB-GYNs provide patients. And it could lead to a dramatic expansion of surveillance and criminalization of pregnancies. While initially a fringe strategy in the United States, the legal strategy to assign rights to embryos and fetuses is now front and center, given new energy by the Supreme Court’s wrongful and devastating decision to overturn *Roe v. Wade*.<sup>4</sup>

The legal strategy to give rights and benefits to embryos and fetuses is long-term and wide-ranging. It depends on amassing evidence across the entire legal system and public programs that would buttress an argument that the term “person” in the U.S. Constitution includes fetuses and embryos. Any laws that provide benefits or protections directly to fetuses and/or embryos will be used as evidence to support such an argument. Accordingly, seemingly benign laws passed today that have nothing to do with abortion are providing the foundation that anti-abortion lawyers will rely on in arguing to a future Supreme Court that fetuses and embryos are persons under the U.S. Constitution.

A recent case from Rhode Island encapsulates this anti-abortion legal strategy. In early September 2022, not even three months after the Supreme Court overturned *Roe*, anti-abortion organization and individuals asked the U.S. Supreme Court to weigh in on invalidating a Rhode Island law that would, among other things, provide legal protection for abortion and repeal anti-abortion state laws.<sup>5</sup> In petitioning the Supreme Court to hear the case, the anti-abortion organization and individuals directly asked the Supreme Court to recognize that the “unborn” are protected under the U.S. Constitution.<sup>6</sup>

In arguing that the Court should take up the case, the anti-abortion organization and individuals made several arguments. First, they asserted that there is a longstanding legal and “common” understanding that an “unborn human being is a ‘child.’” They also cited inheritance and property decisions applying to fetuses; gave the example of malpractice lawsuits for injuries to a fetus during birth; enumerated legal “rights” Rhode Island arguably extended to fetuses, including in wrongful death claims, inheritance actions, and registration of fetal death; and pointed to a law, repealed decades ago, that stated that “human life commences at conception.”<sup>7</sup> The anti-abortion organization and individuals characterized the grounds for concluding that fetuses are persons under the U.S. Constitution as follows: “There is near total accord among the States where protection for the unborn is provided for in probate, criminal, estate, property, and tort laws.”<sup>8</sup>

While the Supreme Court rejected the cert. petition, this case underscores how the legal strategy for recognizing embryos and fetuses as persons works. After lawmakers pass laws that assign rights or benefits to embryos and fetuses (or include them within their definitions of “children” or “persons”), anti-abortion extremists point to those laws to make the case that fetuses and embryos are persons under the U.S. Constitution, in order to invalidate abortion protections and lead to abortion bans.

The legal strategy for recognizing embryos and fetuses as persons under the law entails four main steps:

- **Step One:** Insert rights for embryos and fetuses throughout federal and state laws.
- **Step Two:** Argue in court that these laws that provide separate rights for embryos and fetuses (and sometimes zygotes) establish that they are individuals separate from the pregnant person.
- **Step Three:** Get courts to begin to recognize that embryos and fetuses are “persons” entitled to rights under the U.S. Constitution, including the Fourteenth Amendment’s “right to life.”<sup>9</sup>
- **Step Four:** Argue that the U.S. Supreme Court should strike down state or federal laws that protect abortion, birth control, or fertility care as violating the federal constitutional rights of embryos and fetuses (and potentially zygotes) that previous cases have established. This final step would also mean the government could protect the rights of embryos and fetuses through invasive and oppressive control over anyone who could potentially become pregnant.

Plainly said, pregnant individuals lose rights when embryos and fetuses are granted rights, the latter necessarily take away rights from the former. Once the Supreme Court overturned *Roe v. Wade*, anti-abortion advocates reinvigorated their legal strategy to have the U.S. Supreme Court recognize that embryos and fetuses are “persons” as protected in the U.S. Constitution.<sup>10</sup>

- 1 See *The Data: Reproductive Rights*, STATES NEWSROOM (May 30, 2025), <https://www.newsfromthestates.com/see-data-reproductive-rights>.
- 2 Lauren Mascarenhas & Isabel Rosales, *Alabama Clinics Resume Treatment Under New IVF Law, but Experts Say It Will Take More Work to Protect Fertility Services*, CNN (Mar. 7, 2024), <https://www.cnn.com/2024/03/06/us/alabama-ivf-fertility-protection/index.html>; Azeen Ghorayshi & Sarah Kliff, *I.V.F. Threats in Alabama Drive Clinics to Ship Out Embryos*, N.Y. TIMES (Aug. 12, 2024), <https://www.nytimes.com/2024/08/12/health/ivf-embryos-alabama.html>; Rolonda Donelson & Rebecca Reingold, *Creeping Personhood: Analyzing the Impact of Alabama Supreme Court's Decision on IVF*, GEO. L. ONIELL INSTITUTE (Mar. 19, 2024), [Creeping Personhood: Analyzing the Impact of Alabama Supreme Court's Decision on IVF](https://www.georgetown.edu/news/creeping-personhood-analyzing-the-impact-of-alabama-supreme-court-s-decision-on-ivf) - O'Neill : O'Neill.
- 3 The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The anti-abortion movement argues that the protection against a state depriving “any person of life” reaches fetuses and embryos.
- 4 In *Roe v. Wade*, the U.S. Supreme Court explicitly held that fetuses are not persons for purposes of the U.S. Constitution. Recognizing that “the word ‘person,’ as used in the Fourteenth Amendment, does not include” fetuses,” *Roe v. Wade*, 410 U.S. 113, 158 (1973). the *Roe* Court explained what would happen if it were to hold otherwise: “The appellee and certain amici argue that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.” *Id.* at 156-157.
- 5 Petition for Writ of Certiorari, *Jane Doe v. McKee*, No. 22-201 (R.I. 2022), [https://www.supremecourt.gov/DocketPDF/22/22-201/236882/20220901130349933\\_Petition%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/22/22-201/236882/20220901130349933_Petition%20Brief.pdf). The law was passed by the Rhode Island legislature in 2019 and was first challenged in Rhode Island courts. The Rhode Island Supreme Court refused to overturn these protections, rejecting the argument that fetuses had standing to challenge the law. The State Supreme Court partially relied on the U.S. Supreme Court decision in *Roe v. Wade* that fetuses are not persons, and also that fetuses did not have rights or status under Rhode Island’s criminal statutes that had criminalized abortions. *Benson v. McKee*, No. 2020-66-Appeal (PC 19-6761) <https://www.courts.ri.gov/Opinions/20-66.pdf>. In *Roe v. Wade*, the Supreme Court held: “The word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” *Roe v. Wade*, 410 U.S. 113, 158 (1973).
- 6 See *Jane Doe v. McKee*, No. 22-201 (“Whether, in light of *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_\_ (2022), the Rhode Island Supreme Court erred in holding that the unborn Petitioners, regardless of gestational age, are not entitled to the protections and guarantees of the due process and equal protection clauses of the United States Constitution?”).
- 7 *Id.* at 26-27.
- 8 *Id.* at 27.
- 9 “Nor shall any State deprive any person of life, liberty, or property, without due process of law” U.S. Const. amend. XIV, § 1.
- 10 In fact, the majority in *Dobbs* who overruled *Roe v. Wade* specifically left the door open regarding whether rights attach to an embryo or fetus: “Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent [who supported maintaining the constitutional right to abortion], by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution requires the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation’s legal traditions authorizes the Court to adopt that “‘theory of life.’” *Dobbs* at 38.