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A Precedential Peek at Personhood and the Technological Singularity

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The Technological Singularity, or Singularity for short, is a hypothetical point in the future when a super-intelligence, whether artificial or not, redefines civilization by achieving exponential gains in its own intelligence, and with its superior intelligence, significantly outperforms humans of even the highest intellect.¹ The Singularity is not inevitable, but could occur through several means. The most popular version of the Singularity is by way of artificial intelligence; but nootropics,² human-machine hybrids, genetic engineering, and other seemingly sci-fi alternatives could also potentially trigger the Singularity.³

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¹ Vernor Vinge, *The Coming Technological Singularity: How to Survive in the Post-Human Era*, NASA, VISION-21: INTERDISCIPLINARY SCIENCE AND ENGINEERING IN THE ERA OF CYBERSPACE 11 (1993), <http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19940022855.pdf>.

² See *Nootropic-Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/nootropic> (last visited Nov. 2, 2015) (defining nootropic as “a substance that enhances cognition and memory and facilitates learning”).

³ Vinge, *supra* note 1.

The key issue is whether and how to extend personhood to something that has super-human intelligence, regardless of whether its source is human or not. Though others have made broad attempts at defining a new legal test for personhood,⁴ have demonstrated that most tests would be problematic,⁵ or have drawn upon a specific area of law as analogy,⁶ the approach here is quite different. This article instead attempts to catalogue key U.S. Supreme Court decisions to indicate how previous characterizations of personhood may inform future decisions with regard to the Singularity.

The decisions discussed below fall into several categories. They each represent areas that flirt with the boundary line of personhood: (1) abortion, (2) corporate personhood, (3) right to die, (4) slavery, namely the Dred Scott case, and (5) miscellaneous Supreme Court musings on otherwise exploited persons.⁷

I. Abortion Cases

Beginning with *Roe v. Wade*, the Supreme Court's decisions on abortion delve deep into the concept of what defines life and personhood. To resolve the question of whether a fetus is a person under the Constitution, the Court in *Roe* was forced to concede that "[t]he

⁴ F. Patrick Hubbard, *'Do Androids Dream?': Personhood and Intelligent Artifacts*, 83 TEMP. L. REV. 405 (2011).

⁵ James Boyle, *Endowed by Their Creator? The Future of Constitutional Personhood*, THE FUTURE OF THE CONST., 10 (The Brookings Inst. 2011), http://www.brookings.edu/~media/Research/Files/Papers/2011/3/09-personhood-boyle/0309_personhood_boyle.pdf.

⁶ Jon Owens, *The Future of the Animal Rights Movement: Environmental Conflict, Artificial Intelligence, and Beyond*, 33 ENVTL. L. REP. 10265 (2003).

⁷ For a more in-depth discussion of personhood that includes historical common law, but is narrowly focused on improved humans and criminal laws, see Susan W. Brenner, *Humans and Humans+: Technological Enhancement and Criminal Responsibility*, 19 B.U. J. SCI. & TECH. L. 215 (2013).

Constitution does not define ‘person’ in so many words,” despite the fact that the word is used in several contexts throughout the Constitution.⁸ In the same paragraph, the Court then summarily concluded that the word “person” as used in the Constitution refers to postnatal persons.⁹ The Court expanded on that conclusion, noting that if a fetus is a person, allowing an abortion even where the mother’s life is at stake implicates due process protections for the fetus.¹⁰ Similarly, the Court noted, the mother is not an accomplice or principal when the abortion is performed.¹¹ This passing reference suggests that homicide statutes are useful in ascertaining personhood, as well as whether the application of due process leads to absurd results.¹² Despite holding that fetuses are not persons, the Court established that the Constitution protects “the potentiality of human life.”¹³ The fact that Justice Blackmun carefully limited the State’s interest to the potentiality of *human* life has significant import in the Singularity context, given that either a human or non-human being could trigger the Singularity.

However, the plurality opinion of *Planned Parenthood v. Casey* mentions the fundamental interest in “human” life only when quoting *Roe v. Wade*.¹⁴ All other language in the majority opinion omits the “human,” and instead opts to simply state that there is an interest in potential life,

⁸ *Roe v. Wade*, 410 U.S. 113, 157 (1973).

⁹ *Id.*

¹⁰ *Id.* at 157 n.54.

¹¹ *Id.*

¹² In the Singularity context, Boyle provides an absurd application of due process by describing Hal, an ultra-intelligent artificial intelligence, who seeks “an injunction to prevent his creators wiping him and starting again from the most recently saved tractable backup.” Boyle, *supra* note 5, at 2.

¹³ *Roe*, 410 U.S. at 162.

¹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992).

and occasionally qualifies it as fetal life.¹⁵ Interestingly, the opinions of Stevens, Blackmun, Rehnquist, and Scalia all make explicit reference to the State's interest in "human" life.¹⁶

II. Corporate Personhood

Justice Ginsburg's dissent in *Burwell v. Hobby Lobby Stores, Inc.* notes that "the exercise of religion is characteristic of natural persons, not artificial legal entities,"¹⁷ although the majority opinion implies the contrary – that corporations can hold religious beliefs.¹⁸ Justice Ginsburg also quotes Justice Stevens' opinion in *Citizens United v. FEC*, in which he writes that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires."¹⁹ Thus, both Justices Ginsburg and Stevens suggest that the definition of a person should include the capacity to exercise religion, to hold beliefs, and to have a conscience, feelings and desires. However, as even Justice Stevens realizes, the majority in *Citizens United* "almost completely elides" the fact that human beings and corporations are different,²⁰ a statement that holds equally true for the majority in *Hobby Lobby*. Instead, the majority in *Citizens United* spends an entire page citing precedent establishing that corporations are persons with First Amendment rights.²¹ This suggests that the Court relies heavily on earlier corporate personhood cases, which do in fact take note of the distinctions between man and corporation.

In 1809, the Court acknowledged a corporation and its capacity to

¹⁵ *Id.* at 859, 870-879, 882, 886, 898.

¹⁶ *Id.* at 914, 915, 932, 956, 968, 982, 989.

¹⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014).

¹⁸ *Id.* at 2775.

¹⁹ *Id.* at 2794 (quoting *Citizens United v. FEC*, 558 U.S. 310, 466 (2010)).

²⁰ *Citizens United*, 558 U.S. at 465.

²¹ *Id.* at 342.

sue in Federal Court when it held in *Bank of the United States v. Deveaux* that “the term citizen ought to be understood as it is used in the constitution . . . [t]hat is, to describe the real persons who come into court.”²² It was on this basis that *Deveaux* limited federal diversity jurisdiction only to corporations whose members could, themselves, sustain diversity jurisdiction.²³ Thus, *Deveaux* hints at the Court’s early preference for the real persons that underlie the “invisible, intangible, and incorporeal,”²⁴ which in 1809 referred to corporations, but could just as easily refer to a hyper-intelligent network of computers in the future. In any event, *Deveaux* does not describe what a real person is. Ten years later, the Court described corporations as “artificial, immortal being[s]” that possessed “individuality,” and subsequently endowed them with a property right based in the Contract Clause.²⁵ Then the Court, in *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, while clarifying a corporation’s federal jurisdiction, wrote that the qualities of a corporation include “residence, habitancy, and individuality,” which was enough for a corporation “to be a person, though an artificial one . . . for the purpose of suing and being sued,” making a corporation a citizen of its resident state.²⁶ Unfortunately, in 1886 the Court, unprompted during oral arguments, firmly established that corporations are persons for constitutional purposes.²⁷

²² *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 91 (1809).

²³ *Id.*

²⁴ *Id.* at 88.

²⁵ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636, 642 (1819).

²⁶ *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 555, 559 (1844).

²⁷ *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (“The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.”); see also William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737-38 (1949) (“Thus without argument or opinion on the point the *Santa*

III. Right to Die Cases

In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court wrote that the government can “assert an unqualified interest in the preservation of human life,” and weigh that interest against the liberty interests of the individual when considering the end-of-life wishes of a person in a vegetative state.²⁸ However, in his dissent, Justice Stevens pinpoints the assumption on which the majority rests its opinion: “there is a serious question as to whether the mere persistence of their bodies is ‘life’ as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.”²⁹ It was undisputed in *Cruzan* that a vegetative human body was a person, but the majority implicitly answered the dissent’s concern that such a person has ‘life’ when it gave the State an interest in it.³⁰ Thus, the majority essentially held that a human body, with no capacity to think, is a person with constitutional guarantees, simply because that body is human.

The other major case before the Supreme Court involving the right to die, *Washington v. Glucksberg*, concerned assisted suicide for those with terminal and painful illnesses.³¹ In upholding Washington State’s ban on assisted suicide, the Court remarked that “the sanctity of life” is encapsulated in homicide laws.³² Though the language fails to limit such

Clara case became one of the most momentous of all our decisions. . . . Corporations were now armed with constitutional prerogatives.”).

²⁸ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990).

²⁹ *Id.* at 345 (emphasis in original).

³⁰ *Id.* at 282 (“[W]e think a State may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.”).

³¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

³² *Id.* at 716 (quoting A.L.I., Model Penal Code § 210.5 cmt. 5 (Official Draft and Revised Comments 1980)).

sanctity to *human* life, it is clear that in the context of homicide and that term's plain meaning, the Court more likely meant that the life of a human is inviolable, rather than the life of another animal or being.³³ Yet again, the Court addressed human persons, and left open the question of how protected the life of a non-human person is.

IV. *Dred Scott v. Sandford*

Though the decision in *Dred Scott v. Sandford* has been almost universally panned, even by a Justice of the Supreme Court,³⁴ it demonstrates that personhood can be meaningless if the Court creates other roadblocks to constitutional rights and privileges. Thus, in the *Dred Scott* decision, the Court had no trouble holding that members of the “unfortunate race” – referring to African peoples – are persons.³⁵ Despite pronouncing them as persons, Chief Justice Taney prevented all descendants of African slaves, whether free or still in bondage, from having almost any rights or privileges under the Constitution.³⁶ By constructing different classes of persons, the Court was able to deny citizenship to such people, thus stripping them of:

the right to enter every other State whenever they pleased . . . to sojourn there as long as they pleased, to go where they pleased . . . the full liberty of speech in public and in private upon

³³ See *Homicide-Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/homicide> (last visited Nov. 2, 2015) (describing homicide origin as “. . . from Latin *homicida*, from *homo* human being + *-cida -cide*”).

³⁴ See Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting); CHARLES EVANS HUGHES, *The Supreme Court of the United States: Its Foundation, Methods and Achievements* 50 (1928) (Hughes, who later became Chief Justice and who had previously been an Associate Justice stated that the decision was the Court's “self-inflicted wound.”).

³⁵ See *Dred Scott v. Sandford*, 60 U.S. 393, 403, 407 (1856).

³⁶ *Id.* at 405.

all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.³⁷

Holding that descendants of African slaves were *de jure* persons, but of “an inferior and subordinate class” essentially made them *de facto* non-persons.³⁸ Of course, the Fourteenth Amendment overturned *Dred Scott v. Sandford*,³⁹ but creating different classes of persons and providing different degrees of constitutional rights could be a potential outcome for enhanced humans or artificial intelligence that has achieved super-intelligence.

V. Miscellaneous Court Musings

In the context of aliens, or undocumented immigrants, the Court has held that though not citizens, they are persons and are still afforded certain rights, such as due process.⁴⁰ In addition, women, despite the fact that they could not vote, were considered both persons and citizens by 1874.⁴¹ Although the Supreme Court has not directly addressed the issue of animals and their purported personhood, historically courts have not regarded animals as persons.⁴² Of children, Justice Douglas aptly stated that, “illegitimate children are not ‘nonpersons.’ They are humans, live,

³⁷ *Id.* at 417.

³⁸ *Id.*

³⁹ U.S. CONST. amend. XIV § 1; *Washington v. Glucksberg*, 521 U.S. 702, 758 (1997) (Souter, J., concurring).

⁴⁰ *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *see also Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (“[T]he Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, *see Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), protects persons as well as citizens . . .”).

⁴¹ *Minor v. Happersett*, 88 U.S. 162, 165 (1847). *But see* U.S. CONST. amend. XIX (ratified 1920).

⁴² *See* Tamie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247, 247-48 (2008).

and have their being.”⁴³

Thus, ‘having a being’ is apparently another factor used in determining personhood, though it is not clear what Justice Douglas meant in using it. In one of Justice Burger’s dissents, he too waxes philosophic about the threshold between a person and a nonperson. He wrote that when a suspect cannot waive his Sixth Amendment privilege after invoking it, “[i]t denigrates an individual to a nonperson whose free will has become hostage to a lawyer.”⁴⁴ Thus, it appears that free will and ‘being’ have been considered components of personhood as well.

VI. Conclusion

There remains the issue of how super-intelligence alone, whether imparted on human or non-human, could alter that being’s personhood status. Supposing such super-intelligence would be orders of magnitude greater than current human intelligence, it seems possible that they could be so intelligent as to be entirely different from how we envision a legal person. In fact, they could be so different that inclusion in our society may not even be possible. In addition to whether such a super-intelligence could exist alongside human civilization, there is also the issue as to whether that would be something they desire. Those issues are beyond the scope of this article, and represent moral and philosophical issues rather than legal ones. Nonetheless, for the purpose of this article, it is assumed that such super-intelligence would stretch the legal definition of person so far as to possibly exceed the bounds of that definition.

It is clear from the outset that the Supreme Court has a predilection

⁴³ *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (holding illegitimate children are persons under the Equal Protection Clause of the Fourteenth Amendment and cannot be discriminated against).

⁴⁴ *Brewer v. Williams*, 430 U.S. 387, 419 (1977) (Burger, J., dissenting).

for human personhood, especially postnatal, even when that person is merely a potentiality or in a vegetative state. That would be unfortunate for the personhood prospects of non-human super-intelligences, and further begs the question of how to define humanness. Would a human with an embedded computer chip be human? Would a genetically engineered human still be human, despite appearing human otherwise? How about a human mind uploaded to and operating in a computer? Thus, humanness is not a reliable component of personhood if it too evades definition in the Singularity context.

The Supreme Court has relied on criminal laws, and they are useful, concrete examples. However, they may be slow to update because they have, since time immemorial, dealt with humans of certain intelligence. As it stands, it would be a question of whether super-intelligences would be subject (and subjectable, as they could outsmart jailers and investigators) to criminal laws.

The word “individuality,” used in two different decisions, appears to have some importance in defining personhood, although its ambiguity may offset its apparent utility. The Court has also unhelpfully used the term ‘being.’ Justices Ginsburg and Stevens stated in separate dissenting opinions that the existence of religiosity, sentience, and intentionality all could play important roles in determining personhood. Though these are philosophically and qualitatively important in determining personhood, the Court granted personhood to corporations, which specifically lack these things. Additionally, the quantitative counterparts of each, like the Turing Test, run the dangerous risk of misclassification.⁴⁵ Furthermore, all of these are vague terms that mostly represent a minimum threshold of personhood.

⁴⁵ See Boyle, *supra* note 5, at 10, 12 (discussion of the failure of various quantitative tests for personhood).

The Singularity context instead represents an upper limit to personhood. The Supreme Court has thus essentially stated that humanness and degrees of intelligence determine personhood. A super-intelligence will likely have provable intelligence, but may or may not be human. Plus, a human with super-intelligence would be super-human, and thus arguably a non-person. Therefore, based on its previous approach to personhood as a minimum, the Supreme Court will continue to be ill-equipped to handle the Singularity.