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SEMANTICS AND LEGAL INTERPRETATION: A COMPARATIVE STUDY OF THE VALUE OF EMBRYONIC LIFE UNDER ARGENTINE AND U.S. CONSTITUTIONAL CASE LAW

María del Pilar Zambrano* and Estela B. Sacristán†

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I. INTRODUCTION

The question regarding the legal status of the embryo hinges around a more conceptual —or, rather, more fundamental— legal distinction, namely, the distinction between "things" and "persons." What is involved here is determining whether embryonic human life is personal life and, thus, whether the embryo has rights, or whether is it just the object of somebody else´s rights.

This radical discussion becomes apparent in other more technical and concrete debates about the relationship between the value of human life and its stage of biological development, or its viability perspectives.[1] The claim that the legal value of embryonic life depends upon its stage of development and its viability perspectives is, as shall be discussed later, one of the main

1. In statutory law, this claim has been performed by means of the much discussed conceptual distinction between embryos and "pre-embryos" as can be seen, for example, in Spanish legislation concerning the donation and use of embryos (Ley No. 42, 1988) for therapeutic or scientific research use, and the Law concerning assisted reproduction (Ley No. 35, 1988). For a critical review of the ethical and legal implications of this conceptual distinction in American Constitutional Law, *see, e.g.*, Joshua S. Vincinguerra, *Showing "Special Respect" – Permitting the Gestation of Abandoned Preembryos*, 9 ALB. L.J. SCI. & TECH. 399, 405 (1999); *and* more recently, Robert Stenger, *Embryos, Fetuses and Babies: Treated as Persons and Treated with Respect*, 2 J. HEALTH & BIOMED. L. 33, 33 (2006).

arguments in favor of the right to abortion in American constitutional case law and, extensively, in favor of the right–and sometimes duty–to discard embryos. This claim is grounded, at least, on two normative propositions. According to the first one, constitutional norms would admit the existence of legal personhood only after birth, and/or would make the legal value of non-personal unborn life depend on its viability. The second proposition states that, in the light of the un-personhood of the embryo, the constitutional principle of equality would not be applicable to them.

As shall be described, Argentine constitutional case law rejects—with some exceptions—those distinctions based upon the contrary normative premises, according to which constitutional principles admit the personal quality in each and every human being from the time of conception, which is, in turn, set at the moment of fertilization. On this basis, it is understood that these same norms would recognize equal dignity in every person and would proscribe making the legal value of human life–which is always the life of a person–depend on the stage of development or on the (chances of) viability inside or outside the mother´s womb.

Two mutually complementary analyses will be examined in the next paragraphs. An Argentine and U.S. case law review will be carried out in order to infer the arguments that have been posed in both constitutional practices regarding the acceptance or rejection of those conceptual distinctions (sections II & III).

This comparative approach is justified by the fact that, as it has been insistently pointed out by various *ius*-philosophical schools of thought, the abstract nature of constitutional language is an open door to political, ethical, and philosophical assessments or, in Rawlsian terms, to the "comprehensive conceptions" of those who interpret and adjudicate law. In this light, although the arguments for legal protection of embryonic life and the counterarguments for a lack of legal protection of embryonic life arise in different normative contexts, the creative nature of constitutional

interpretation justifies the comparative approach propounded in this review.

However, there is more to constitutional interpretation than mere creativity. In order to be framed within a particular legal practice, legal interpretation should confine itself to two kinds of requirements. On the one hand, it should be coherent with the values, goods or ends that should be common to all legal practices in order to distinguish themselves from sheer violence.[2] On the other hand, legal interpretation should conform to the way that the particular legal practice within which it finds itself determines those common values, goods or ends which are common to all legal practices. This means that it should take into account the semantic and syntactic rules that apply to the legal statements under interpretation.

Creativity in interpretation operates, accordingly, within the framework of two margins: the teleological one and the linguistic or, more generally, the semantic one. These restrictions to interpretative creativity also set logical limits to the transposition of arguments from one constitutional practice, such as that of the

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2. *See* PILAR ZAMBRANO, LA INEVITABLE CREATIVIDAD EN LA INTERPRETACIÓN JURÍDICA. UNA APROXIMACIÓN IUSFILOSÓFICA A LA TESIS DE LA DISCRECIONALIDAD 65 (Instituto de Investigaciones Jurídicas 2009; no. 142 in the ESTUDIOS JURÍDICOS series) [hereinafter ZAMBRANO, LA INEVITABLE CREATIVIDAD]. Among the many authors who agree on the description of interpretation as a comprehensive task which includes a creative dimension, not to be confused with unrestricted discretion, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY at Ch. I-IV (Harvard Univ. Press 1977); RONALD DWORKIN, A MATTER OF PRINCIPLE at Ch. I-VI (Clarendon Press 1985; RONALD DWORKIN, LAW'S EMPIRE 65-68, 411-413 (Harvard Univ. Press 1986); RONALD DWORKIN, FREEDOM'S LAW. THE MORAL READING OF THE AMERICAN CONSTITUTION 10 (Harvard Univ. Press 1996); RONALD DWORKIN, JUSTICE IN ROBES 18-21 (Harvard Univ. Press 2006). For a critical review in Spanish language of Dworkin´s proposal, *see* Pilar Zambrano, *Objetividad en la interpretacion judicial y objetividad en el Derecho. Una reflexion a partir de las luces y sombras en la propuesta de Ronald Dworkin*, 56 PERSONA Y DERECHO 281 (2007), *and* ZAMBRANO, LA INEVITABLE CREATIVIDAD 37-53. The most relevant author insisting on the possible synthesis of creativity and objectivity in interpretation, outside the English language field, is perhaps ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 17 (Ruther Adler & Neil MacCormick trans., Clarendon Press 1989).

U.S., to another, such as that of Argentina. Therefore, the benefit of the proposed comparative analysis will depend upon the adequacy of the questions that are posed. With these restrictions in mind, the questions that this comparative study aims to answer are:

Which is the justificatory or teleological perspective of interpretation assumed or postulated in each of these case law practices? (Section IV B(1))

Which is the semantic theory underlining the whole interpretative process in each of these case law practices? (Section IV B(2))

Which of these teleological and semantic postulates best fit the final aims or values of constitutional law? (Section V)

In the end, we aim to reflect upon the reciprocal influence between these two margins of interpretation. Particularly, we intend to test the coherence between, on the one side, the claim that fundamental rights are deontological and, on the other, the assumption of a constructive or criterial semantic theory of language in the interpretation of the concept of legal personhood (section V).

II. THE EMBRYO IN U.S. CONSTITUTIONAL CASE LAW

Although the status of the embryo is not regulated by federal statutory law, it may be induced from the federal Supreme Court decisions concerning the issue of abortion that, as a whole, establish the legal status of the unborn in its various gestational stages. The leading cases in this line are the well-known *Roe v. Wade*[3] and *Casey*.[4]

A. The Value of the Embryo´s Life under Roe v.Wade

The famous case of *Roe v. Wade*, argued before the United States Supreme Court, challenged a Texas criminal abortion statute

3. Roe v. Wade, 410 U.S. 113 (1973).
4. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

which penalized abortions in all cases, except when pregnancy meant a risk to the life of the mother.

The District Court found the Texas Act unconstitutional in the light of the 9th Amendment, which admits implicit rights stemming from the U.S. Constitution, but denied the injunction that would have allowed Roe to benefit from this unconstitutionality. Roe filed for an appeal to have the original decision upheld, and to obtain the injunction.[5]

The Supreme Court analyzed Roe's claim in the light of the fundamental right to privacy, a right that, even if not explicitly mentioned in the U.S. Constitution, had been recognized by the Court in previous cases as a necessary dimension of other liberty rights that were explicitly recognized.[6] The Court, then, had to decide whether the choice to abort was one of the dimensions of that fundamental right or preferred freedom, what its extent was, and to which constitutional clause it was related. These decisions called for a previous determination as to the moment in which the U.S. Constitution admits the existence of personhood in law. In this sense, the Court asserted that:

> The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. . . . 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.[7]

The majority solved this interpretative question by denying the fetus´s personhood on the basis of semantic, syntactic and historical arguments. From both the semantic and the syntactic points of view, it was argued that none of the constitutional clauses define the meaning of the word "person," and that each time such word is used, it is with reference to human beings that have already

5. Roe v. Wade, 410 U.S. at 122.
6. *Id*. at 153-55.
7. *Id*. at 157.

been born.[8] From the historical point of view, it was stated that at the time that the 14th Amendment was passed, and during most of the nineteenth century, state legislation relating to abortion was much more permissive than it currently was. This historical fact, combined with the presumption that the authors of the Texas legislation under review knew about this legal context, would indicate that the constitutional drafters had no intention to include the *unborn* as subject to the rights established in that Amendment.[9] Relying on these arguments, the Court concluded that the term "person," as used in the Constitution, does not apply to the unborn.[10]

Out of conceptual necessity, the denial of the personhood of the unborn became the denial of the right to life before birth. But this denial did not prevent the United States Supreme Court from recognizing a legitimate state interest in the protection of embryonic and fetal life, which was called "potential human life." Nevertheless, as the right to abortion had been recognized as a "preferred freedom" or "fundamental right," the constitutionality of the rules regulating abortion in view of this interest depended on whether or not they passed the strict scrutiny test: that is, the requirement that the states justify both the compelling nature of the interests at stake and the norms they are seeking to promote – i.e., that a compelling state interest exists, as well as the necessary relationship between them.[11]

Based on this, the Court recognized the already renowned three-stage balancing of rights that is comprised of the right of the mother to abort, and the two state interests that have been deemed legitimate.[12] According to this three-stage concept, the Court understood that it is only during the third trimester that the state

8. *Id*. at 158.
9. *Id*.
10. *Id*.
11. *Id*. at 159.
12. *Id*. at 163-64.

interest in the protection of the "potential human life" acquires enough relevance so as to justify the criminalization of abortion.

B. Balancing the Right to Abortion and State Interest in Potential Human Life

Regarding our object of interest, *Roe's* conceptual inheritance is that legal personhood is not recognized by constitutional text and practice until birth, but, nevertheless, there is a legitimate state interest in "potential human life" from the moment of conception.

Taking *Casey*[13] as a landmark case in post-*Roe* case law, the balancing standards between the right of the mother to abort and the state interest in potential human life were constructed around the following issues: (a) whether states were or were not enabled to set forth a legal duty that women perform fetal viability tests prior to the abortive proceedings that were carried out during the second trimester; (b) what was the constitutionally admissible content of informed consent prior to abortive proceedings, and who had to provide it; and (c) whether or not the states were enabled to promote their interest in potential human life by means other than prohibiting abortion during the first two trimesters.

Regarding the issue of compulsory fetal viability exams, the Court issued contradictory statements, first banishing them and then opening the way to them.[14] With varied grounds and a crucially tight majority, the Court cleared the way in *Webster*, affirming that state regulations could establish compulsory pre-procedure medical viability tests independent from the trimester in which the tests were ordered, under the sole condition that viability

13. Casey, 505 U.S. 833.

14. *See* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 63-65 (1976), banishing State intrusion, *and* Colautti v. Franklin, 439 U.S. 379, 390-97 (1979), allowing it.

was possible according to ordinary medical criteria and the exams did not pose a risk to the mother's health.[15]

As to the content of informed consent, the Court found that any state regulations aimed at deterring the mother from her decision to abort rather than informing her about the risks involved in an abortion proceeding were contrary to the Constitution. These regulations were deemed to ignore the trimester scheme involved in *Roe*, and were therefore deemed unconstitutional.[16]

Finally, regarding the non-coercive use of the sovereign power, the Court held, invariably—although on a tight majority—that the states were not under an obligation to assign public funds to provide abortions nor were they under an obligation to perform abortive proceedings in public health institutions, even when either of those choices implicitly promoted childbirth over abortion.[17] Along this line of thought, it was also held that a state could lawfully establish that human life starts at conception in so far as such statement did not have the practical effect of casting aside the balancing trimester schema.[18]

To sum up, as it was pointed out in the plurality opinion in *Webster*, the Court had progressively become a kind of medical committee, assisted by legislative powers, regarding the most varied implications of abortive proceedings: establishing how long of a waiting period prior to abortion procedures the law should set; what issues had to be included in the informed consent and which were to be excluded; who could provide the informed consent; when was it legitimate to conclude that the fetus was viable and

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15. Webster v. Reproductive Health Services, 492 U.S. 490, 515-21 (opinion of Rehnquist, C.J., White, J. and Kennedy, J.); 526 (concurring opinion of O´Connor, J.); and 538 (concurring opinion of Scalia, J.) (1989).

16. *See* Akron v. Akron Center for Reproductive Health, 462 U.S. (1983), 443-45; later confirmed in Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747, 762-63 (1986).

17. *See* Maher v. Roe, 432 U.S. 464, 475-79 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977); Harris v. McRae, 448 U.S. 297, 325 (1980).

18. Webster v. Reproductive Health Svcs., 492 U.S. at 513.

when was it legitimate to conclude it was not viable; what the consequences were; etc.[19]

Along this process, the function of the *Roe* tripartite schema became blurred and increasingly murky. It was expected that it would provide clear and precise criteria regarding the way in which the state's interests and the case law-based rights of the mother to abort were to be balanced; however, only case law dealing with informed consent stands as a seamless application of the schema. The remainder of the questions posed before the Court only succeeded in stretching the strings to the breaking point, as was highlighted particularly in *Webster*, in which four judges issued a dissenting opinion,[20] but no explicit majority was reached because there were not five judges reaffirming or holding the constitutional validity of *Roe*.

In addition to all this, the decisions of the Court were almost always made, as in *Roe*, with an extremely narrow majority that remained united at the level of the judgment, but at variance when it came to providing the reasoning for the decisions. Disparate grounds and miniscule majorities resulted in an unsurprisingly complex set of rules that offered, to the law community in general, and the states' highest courts in particular, confusion instead of clarity. This state of confusion was specifically acknowledged by the majority in *Casey*,[21] and this is why it could be affirmed that the cards were, in a way, reshuffled.

Indeed, in *Casey*, the Court revised both the tripartite temporal schema and the rights and interests balancing criteria. Regarding the schema, it was decided that the viability of the fetus outside the mother´s womb, and not the length of the pregnancy (i.e., the third trimester) is what established the point at which the state interest in protecting "potential human life" becomes compelling enough to

19. *Id*. at 517-18.
20. Blackmun, J. and Stevens, J. issued dissenting opinions, and Brennan, J. and Marshall, J. joined Blackmun, J.´s opinion.
21. Casey, 505 U.S. at 944-51.

legitimize a ban on abortion. Regarding the balancing criteria, it was admitted that, even prior to viability, the state interest in protecting and promoting potential human life is important enough to enable the states to legitimately promote said potential human life in an active manner, provided that this promotion did not presuppose an obstacle or an undue burden on the exercise of the right to abort. On these grounds, and contrary to prior decisions, it declared that state measures aimed at discouraging the mother from the decision to abort were constitutionally valid.[22]

C. Some Conclusions

According to this review, it can be gathered that the value of human life is not uniform according to the United States Supreme Court case law regarding abortion, for it varies according to the development stage that the fetus may have reached. Three different stages can be individualized. The first would correspond to "non-viable potential human life," which starts at conception and lasts until the moment when the fetus is viable *outside* the mother´s womb, with or without artificial assistance. The second stage would correspond to "viable potential human life," and it would start at the beginning of viability outside the mother´s womb, until birth. The third stage is personal human life, which starts at birth and ends with natural death.

Embryos would fit into the first stage, "non-viable potential human life," and this is why they could be classified as an object of a state interest, characterized by the United States Supreme Court in the following manner:

It is optional for states to promote state or local interests in potential human life.

As a state interest, it is not compelling enough so as to justify the limitation of the mother´s right to obtain an abortion, but it is

22. *Id.* at 874-76.

strong enough so as to justify compulsory measures aiming at deterring the decision to abort.

The states can overtly favor the promotion of embryonic life, as long as this does not pose an undue burden on the mother´s right to abort prior to the moment of fetal viability outside the mother´s womb.

D. The States' Case Law on Embryos

The optional status of both the promotion and the determination of the weight of the state interest in non-viable potential human life—within the limits established by the Court—becomes legally active, at both the federal and state levels, in a fabric that is woven with the most diverse criteria regarding the legal status of the embryo.

That status is defined by the states only on an exceptional basis, as would be the case in the state of Louisiana. In the case of the other states, as well as at the federal level, the status may be inferred from the regulation of different activities that are directly or indirectly related to the use or destination given to embryos conceived *in vitro*. The most relevant of these activities are those that have to do with assisted reproduction, and with the scientific and technological research that requires using, and possibly discarding, embryos. The embryo's status will depend, essentially, on the existence, or lack thereof, of limitations to embryo discard.

Only the legislation of the state of Louisiana and that of New Mexico establish a ban on the sale, destruction or any other process that does not involve embryo implantation for later development. This establishes a duty of care and custody on those clinics in which the embryos were created.[23] On the opposite side, states such as California, Connecticut, Maryland, Massachusetts and

23. LA. REV. STAT. § 9:126; N.M. STAT. § 24-9A-[1][g]. For a comparative study of these two statutes, *see* Diane K. Yang, *What's Mine is Mine but What's Yours Should Also Be Mine: An Analysis of State Statutes that Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587 (2002).

New Jersey expressly establish the duty of medical service providers to inform the patient of the possibility of discarding embryos that were not implanted. However, these same statutes prohibit the sale or commercialization of the embryos, whatever the final aim.[24] Other states, such as Oklahoma, take up an ambiguous attitude: even if they only allow for heterologous conception when performed with a reproductive aim, they omit establishing the same limitation in the field of homologous conception, and also fail to clarify what will be the final use of those embryos that, even if conceived for a reproductive purpose, were never implanted.[25]

At the federal level, ever since the Clinton presidency, a ban has been in place on the use of federal funds for the creation of human embryos for research purposes or for research in which the human embryos were destroyed, discarded or intentionally subjected to a risk of damage or death greater than the risk allowed in research involving fetuses inside the uterus (commonly known as the "Dickey Amendment").[26] This limitation was not extended to include privately funded or state funded, research. However, in March 2009, President Obama issued executive order 13505,

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24. *See* CAL. HEALTH & SAFETY CODE § 125305; CONN. GEN. STAT. § 19a, 32d-32g; MD. CODE ECON. DEV. § 5-2B-10; MASS. GEN. LAWS ch. 111L; N.J. STAT. § 26:2 Z-2.

25. *See* OKLA. STAT. tit. 10, § 555. For a comparative synthesis of states' legislation concerning assisted fertilization, *see* http://www.ncsl.org/programs/health/genetics/embfet.htm (last visited Jul. 12, 2013).

26. This prohibition was not included in a specific statute concerning scientific research on embryos, but was instead included, at the initiative of Senator Jay Dickey, in the Balanced Budget Down Payment Act, I, Pub. L. No. 104-99, § 128(2), 1.10 Stat. 26, 34 (1996), and reapproved each year until 2009. For a detailed and complete description of the federal politics concerning the funding of the use of embryos in scientific research, *see Monitoring Stem Cell Research. A Report of the President´s Council on Bioethics*, Washington D.C., January 2004, available at http://bioethics.georgetown.edu/pcbe/reports/stemcell/ (last visited Jul. 17, 2013). A chronologic synthesis of American state law concerning stem cell research can be found at http://lti-blog.blogspot.com/2009/08/lifting-ban-or-obfuscating-truth-bob.html (a pro-life blog, last visited Jul. 12, 2013).

which removed limitations on the use of federal funds for research on new embryonic stem-cell lines.[27]

Against this backdrop of complex, intertwined criteria, constitutional case law at the state level has basically hinged around the issue of who has the right to decide what the use of the non-implanted embryos or pre-embryos will be, and with what requirements, when there is no agreement between the parents in this respect.

1. Davis v. Davis *and* Kass v. Kass

The leading case in this matter was *Davis v. Davis*,[28] a famous case settled by the Tennessee Supreme Court in 1992. It involved the fate of seven embryos that had been conceived by *in vitro* fertilization. At the time when the progenitors divorced, the embryos were kept under cryopreservation in the clinic in which the progenitors had been given the corresponding treatment.

Initially, and contrary to the wishes of Mary Sue Davis, one of the progenitors, that the embryos be implanted in her uterus, Junior Lewis Davis, the other progenitor, wanted them to remain under cryopreservation until he came to a decision regarding their use. By the time the case reached the state Supreme Court, both parties had changed their claims. Mary Sue wanted the embryos to be donated to any couple that was willing to undergo fertility treatment, insisting on the personal nature (personhood) of the embryos. Junior Lewis wanted them to be discarded. Mary Sue´s contention of embryonic personhood was accepted at the trial court level, explicitly rejected by the Court of Appeals, and, eventually, by the state Supreme Court.

Apart from denying the personal nature of the embryos on the basis of the *Roe v. Wade* ruling, the state Supreme Court also denied that the state interest in "potential human life,"

27. Exec. Order No. 13505, 74 Fed. Reg. 10667 (Mar. 11, 2009).
28. Davis v. Davis, 842 S.W.2d. 588 (Tenn. 1992).

acknowledged as legitimate and optional for states in *Roe v. Wade* and reaffirmed in *Webster*, was compelling enough as to settle the issue in favor of the implantation of the embryos. Relying on state precedents, and on civil and criminal law regulations regarding the fetus' status when it is inside the mother´s womb, the Court concluded that the State of Tennessee had no adopted interest whatsoever in the "potential human life" of the un-implanted embryos.

Therefore, the un-implanted embryos were not the object of any state interest in potential human life, let alone persons. Even so, the Court conceptualized a new category for embryos that placed them in between property and personhood, to which a special respect was owed given its potential to become a person. In reality, this intermediate category was closer to property than to personhood, for the progenitors´ rights on un-implanted embryos were deemed "in the nature of a property interest," and included the right to decide on their disposal.[29]

On these grounds, the Court set forth a principle of interpretation, whereby whenever there is no agreement between the parties, the courts should decide the matter by balancing the opposing interests. Applying this principle to the case, the Court set forth the rule in which the interest of one of the parties in obviating fatherhood or motherhood (in this case, the father) is stronger or greater than the interest of the opposing party (in this case, the mother) in donating the embryos for future implantation.

Kass v. Kass[30] continued the development of state common law in the matter of determining the use of un-implanted embryos whenever there is disagreement between the progenitors. Unlike *Davis*, here there was a prior written agreement that established that if the parties became unable to agree on the use of the un-implanted embryos, they would be donated to be used in assisted reproduction scientific research.

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29. *Id.* at 596.
30. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

Although this agreement between the clinic and the parties was later ratified in the divorce decree, the woman asked that the embryos be implanted in her, against the husband`s wish that the agreement be executed. In all of the judicial proceedings, the debate hinged on the correct interpretation of the agreement signed between the parties and the clinic.

The New York State Court of Appeals affirmed the decision of the trial court that the agreement was clear that in event of disagreement between the parties, the un-implanted embryos had to be used for scientific research, and so decreed that the embryos (described as pre-zygotes) be given for that use.[31]

2. Will as the Ultimate Determinant of the Embryo´s Life Value

The binding nature of the common will of the couple, as expressed in the covenants written by them or as agreed upon between themselves and the clinic, was reaffirmed in *Litowitz*,[32] even when the parties subsequently agree to deviate from the agreement.

In this case, what was at stake was the use of embryos that had been conceived with the husband's reproductive material, and an ovule donated to the couple by a female third party. The agreement between the Litowitzes and the clinic prescribed that, if the embryos were not implanted within five years' time after their conception, the clinic should thaw them; in effect, destroy them. Within a divorce context, and after the five-year deadline had expired, both parties communicated their decision that the embryos that were still frozen be implanted. The issue between the divorcing parties was not whether or not they should be implanted, but rather, in whom. Mrs. Litowitz wanted the embryos to be implanted in her, and the ex-husband wanted the embryos to be donated to another woman. The Washington state court did not

31. Kass v. Kass, 696 N.E.2d at 178.
32. Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

provide a solution for this problem, for no proof had been produced during the trial to show that the embryos were still alive. Even so, the Court ventured to say that, even if their existence were proven, their use should be regulated by the terms of the agreement; i.e., they should be thawed (destroyed).[33]

In *A.Z. v. B.Z.*, the Massachusetts Supreme Court rejected the female progenitor's contention that the agreement signed by the clinic and both of the progenitors, according to which, in case of divorce, the embryos would be implanted at any of the parties' request, be enforced. This Court relied, among other grounds, on the theory that to compel a person to become a father or a mother against his or her will was contrary to public policy, even if they had contractually bound themselves to procreate.[34] This holding was later reapplied by the Iowa Supreme Court *In re Marriage of Witten*[35] and, by way of *obitur dictum*, by a Texas Court of Appeals, in *Roman v. Roman.*[36]

3. Some Conclusions

a. Un-implanted embryos are not conceptually persons, either under federal or state constitutional case law. Nevertheless, they are considered the object of "special respect" because of their potential to become persons, which, although different from the respect owed to personal dignity, must be differentiated from the treatment that is owed to objects of interest or property rights.

b. The exclusive right of the mother to dispose of the embryo's life, acknowledged in *Roe* as a privacy right, only refers to embryos that are already implanted in the mother's womb. It excludes un-implanted embryos, and therefore, the mother has no right to obviate the father's interests to implant or discard embryos that are cryogenically stored.

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33. *Id.* at 271.
34. A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).
35. *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).
36. Roman v. Roman, 193 S.W.3d 40 (Tex.2006).

c. The use of un-implanted embryos is regulated, as a rule, by the progenitors´ unanimous decision.

d. In case of disagreement, the written agreement prior to their conception is binding, provided that it is unambiguous.

e. However, the agreement lacks binding force regarding embryo implantation. In this respect, the present and concomitant meeting of minds of both progenitors is required, both concerning the fact of implantation and the body into which they should be implanted. Therefore, either progenitor has "veto power" regarding embryo implantation, be it in the womb of the mother or in that of a third party.

f. "Special respect" does not mitigate in any way the meeting of minds of the progenitors. It is only a relevant interpretative criterion to be used whenever the use of the embryos must be judicially settled, given a disagreement between the progenitors, and in the face of a lack of a previous written agreement settling the issue.

g. The "special respect" principle does not have enough weight in the "counterbalancing" of interests as to make the embryo implantation compulsory. On the contrary, in this counterbalancing, the interest of one party in not producing a child is heavier than the interest of the opposing party in gestating the embryo or donating the embryo for implantation.

III. THE EMBRYO IN ARGENTINE CONSTITUTIONAL CASE LAW

The Argentine case law on embryos offers a rich range of interpretations that seem to be firmly established. Young as this judicial experience may be, this short time is not an obstacle to reviewing the decisions issued by the Argentine Supreme Court, which is the highest national court in the federal order, as well as those issued by other Argentine courts.

A. The Argentine Supreme Court (2001-2012): Tanus, Portal de Belén *and* Sánchez[37]

In *Tanus*[38] and *Portal de Belén*,[39] the Argentine Supreme Court determined the sense and scope of the constitutional principle of the fundamental right to life in relation to embryonic life. Both judicial decisions, considered as a whole, give rise to the following interpretative rule: this principle is binding in the case of embryos with the same scope, as if it were the case of an already-born person, and no differences based on its development stage or its viability prospects shall be established.

In *Tanus*, the majority of the Court affirmed the appealed decision, which had authorized the induction of labor of an anencephalic fetus in a public hospital. When providing the grounds for the decision, the Court pointed out that, even though the authorization to induce labor had been requested in the 20th week of pregnancy, by the time the case was to be decided by the Supreme Court, the mother had reached the 8th month of pregnancy. According to the Court, this temporal difference allowed for the differentiation of childbirth by induction of labor, on the one hand, and abortion on the other. It was argued that the death of an anencephalic fetus outside the mother's womb, when the stage of extra-uterine viability is reached, is not to be attributed

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37. On Mar. 13, 2012, in the leading case *F.,A.L* (CSJN, "F., A.L. s/ medida autosatisfactiva," Fallos 259: XLVI (2012)), the Argentine Supreme Court issued a decision concerning women´s legal right to abort in case of rape. Although this decision did not openly reject the assertions stated in *Portal* and *Tanus* concerning the legal personhood of the embryos, it did put in question its practical legal effects. It is therefore very likely that the case law era which started with *Tanus* has come to an end with *F.,A.L.* The purpose of this study being to compare the Argentine and the American case laws from the point of view of their respective coherence with the conceptual features of fundamental rights, this comparison only takes into account the era in which the former is relevantly different from the latter. That is, the era which ended in *F.,A.L* and goes from *Tanus* to *Sanchez.*

38. CSJN, "Tanus, Silvia c/ Gobierno de la Ciudad de Buenos Aires s/ amparo," Fallos 324: 5 (2001).

39. CSJN, "Portal de Belén - Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s/amparo," Fallos 325: 292 (2002).

to the anticipated labor induction, but to the congenital condition of the fetus.

Therefore, according to the Court, the case didn´t concern the constitutional validity of abortion, but the way in which two rights were to be counterbalanced: the mother's right to health, and the anencephalic fetus's exercise of its right to life and to health. Considering that in the eighth month, premature birth would not alter the unavoidable death of the child, the Court understood that inducing labor did not alter the essential content of the fetus's right to life or to health.

Leaving aside for the moment its logical validity, it should be noticed that the Court´s reasoning asserted that the fundamental right to life is in force from the moment of conception under the American Convention for Human Rights, Law 23054, article 4.1., and under article 2, Law 23849, which affirms the Children's Rights Convention.[40]

In *Portal de Belén*, the Court reaffirmed this normative interpretation, further specifying that conception takes place at the moment of fertilization. In stating this, the Court relied on the opinion of different geneticists and biologists that "it is a scientific fact that the 'genetic construction' of the person is there [at the

40. "Tanus," *supra* note 38, at cons. 11°. Art. 4 of the American Convention for Human Rights states: "Right to life. 1. Every person has a right to her life being respected. This right shall be granted by Law and, in general, from the moment of conception. Nobody shall be arbitrarily deprived of his life" (the translation is ours). In Spanish: *"Derecho a la vida. 1. Toda persona tiene derecho a que se respete su vida. Este derecho estará protegido por la ley y, en general, a partir del momento de la concepción. Nadie puede ser privado de la vida arbitrariamente"* (Ley No. 23054, B.O. del 27/2/1984). Article 2 of Law 23849 states: "When ratifying the Convention, the following reserves and declarations shall be stated: (…) In relation to article 1 of the Convention, the Argentine Republic declares that it shall be interpreted in the sense that the term "child" is understood to refer to all human being from the moment of conception and until eighteen years old" (The translation is ours). In Spanish: *"Al ratificar la Convención, deberán formularse las siguientes reservas y declaraciones: (…) Con relación al artículo 1º de la Convención sobre los Derechos del Niño, la República Argentina declara que el mismo debe interpretarse en el sentido que se entiende por niño todo ser humano desde el moment de su concepción y hasta los 18 años de edad"* (Ley No. 23849, B.O. del 22/11/1990).

time of conception], all set and ready to be biologically aimed, because 'the egg's' (zygote's) DNA contains the anticipated description of all the ontogenesis in its tiniest details."[41]

From a factual point of view, the Court considered it proven that a contraceptive, the marketing and distribution of which had been authorized by the national Ministry of Health and Social Action, could operate under three subsidiary mechanisms. Contraception could: (i) prevent ovulation, or (ii) operate as a spermicide. Neither of these mechanisms posed a constitutional objection from the point of view of the embryo's right to life. In a subsidiary manner, for the cases in which these two mechanisms had not been successfully activated, the contraceptive challenged in *Portal* would operate by (iii) modifying the endometrial tissue and preventing embryo implantation. The Court found that this subsidiary mechanism violated the embryo´s right to life.[42]

Therefore, on the basis of these normative and factual premises, the Supreme Court revoked the appellate court's decision, which considered it lawful for the National Ministry of Health and Social Action to authorize the marketing and distribution of the contraceptive under challenge.

After these decisions, the Supreme Court acknowledged the personhood of the *nasciturus* in *Sánchez*,[43] leaving aside any considerations related to a hypothetical abortion. When acknowledging the personhood, the Supreme Court qualified the unborn involved in the case as "a person 'to be born', this is to say,

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41. "Portal de Belén," *supra* note 39, at cons. 7°.

42. *Id.* at cons. 9° and 10°.

43. CSJN, "Sánchez, Elvira Berta c/ M° JyDDHH – art. 6° L. 24411 (resol. 409/01)," Fallos 330: 2304 (2007), in which the Court provided a reminder that article 30 of the Argentine Civil Code defines as "persons" all beings capable of acquiring rights and contracting debts, and art. 63 extends the concept of person to all unborn human beings who are conceived in the mother´s womb. Literally: *"[E]l art. 30 del Código Civil define como personas a todos los entes susceptibles de adquirir derechos, o contraer obligaciones; mientras que el art. 63 señala como especie del género "persona" a las "personas por nacer," definiéndolas como aquellas que, no habiendo nacido, están concebidas en el seno materno."* (cons. 9°).

one of the juridical species of the 'person genus' under our civil law . . . ."[44]

B. Some Conclusions

The principles and rules acknowledged and established in both rulings regarding the legal status of the embryo could be summarized as follows:

1. Legal personhood is acknowledged, under Argentine constitutional law, from the moment of conception.

2. Conception is deemed to happen at the moment of fertilization.

3. Any action aimed at interrupting embryotic development after the moment fertilization occurs should be banned, even when this interruption is merely eventual or probable.

4. Therefore, the scientific debate regarding the distinction between pre-embryos and embryos, or between viable embryos and non-viable embryos, lacks legal significance.

C. Other Courts of Law and the Embryo

The case law of other courts regarding the legal status of the embryo has primarily hinged on the debate over two different series of issues: one is whether local birth control policies were constitutional, and the other on establishing the use that should be assigned to frozen embryos created during fertilization procedures. The legal context on which both debates are centered involves, primarily, local and federal statutes regulating sex and reproductive health. Let us review that debate.

1. Birth Control Questions

The trend to regulate the fundamental or constitutional right to health, especially as related to sexual and reproductive health, at

44. *Id.* cons. 11°.

the local or provincial (state) level started in the 1990s and has continued to grow ever since. Therefore, it is a process that started some years before the 1994 constitutional amendment, and at least a decade before the Supreme Court issued its opinion in the *Portal de Belén* case regarding whether the birth control policies allowing the disruption of implantation, or abortive methods in general, were constitutional.

Nevertheless, all statutes issued before and after the 1994 constitutional amendment made the medical prescription and provision of contraceptives dependent on the condition of their non-abortive effect. The same condition is set forth in national Law 25673, promulgated in 2002.[45] Although this law is automatically applicable to health services subject to the federal jurisdiction of the National Ministry of Health, it also empowers the provinces to join the health program created by it. Thus, be it effected directly or indirectly, local regulation of sexual and reproductive health includes a general ban on abortive methods of family planning.

Notwithstanding this ban, some of these norms, or the regulations issued under them, allow contraceptive methods regardless of the distinction between those which operate by inhibiting fertilization and those which potentially inhibit the implantation of the fertilized egg.

This lack of normative precision was subject to judicial debate on different occasions after *Portal de Belén.* A conclusion that can be drawn from this limited, and young, case law *corpus,* is that the debate, at the local or provincial level, does not revolve around embryonic personhood—an aspect that is never challenged—but rather on the details regarding how to adequately weigh it against the mother's right to reproductive health. Primarily, the debate is centered around the normative consequences of the scientific debate regarding the anti-implantation mechanism assigned to

45. Ley No. 25673, art. 6°, B.O. 30032 (Oct. 22, 2002).

emergency contraception and to the intra-uterine device, or to any contraceptive that happened to operate, or could operate, by obstructing the embryo's development. Regarding this issue, the different opinions are detailed in the following paragraphs.

2. A First Look at Portal: All "Emergency" Contraceptives are Held Abortive

In *Asociación Civil Familia y Vida*,[46] a provincial court of San Luis held that articles 1 and 2(c) of provincial Law No. 5344 regulating sexual and reproductive health, and article 4 of its regulatory decree 127/2003, were contrary to the Constitution. The first norm states that "the province of San Luis, by means of the Ministry of Health, shall provide to the inhabitants who apply for it, information, assistance and guidance for responsible parenthood, in order to secure and guarantee the human right to decide freely and responsibly about reproductive patterns and family planning".[47] The second establishes that medical providers in public health assistance institutions should prescribe and provide contraceptive methods.[48]

The local Court understood that this normative plexus was contrary to the Constitution because it failed to expressly exclude the specific contraceptives that forestall implantation from the generic provincial duty of prescribing, providing and inserting contraceptives at public health facilities.[49] As grounds for this argument, the local Court relied on the rule, ostensibly established in *Portal de Belén*, in which *any* post-coital or emergency contraceptive method is to be deemed abortive.[50]

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46. Cámara Civil, Comercial, Minas y Laboral Nº 2 de San Luis, "Familia y Vida Asociación Civil c/ Estado Provincial s/ amparo," Expte No. 18-F-2002, del 21/3/2005.
47. Ley No. 5344, art. 1° (Prov. de San Luis, Oct. 30, 2002).
48. Dto. 127/03, art. 4° (Prov. de San Luis, Jan. 21, 2003).
49. "Familia y Vida Asociación Civil," *supra* note 46, at cons. 3.3.
50. *Id.*

3. A Second Look at Portal*: Applying the* pro homine *Principle in Favor of the Embryo´s Right to Life*

Similar to San Luis Law 5344, Córdoba Law 9073 establishes and regulates the so-called "Responsible Motherhood and Fatherhood Program,"[51] generically making the prescription and delivery of contraceptives at health assistance centers depend on their non-abortive effect. However, Law 9073 differs from Law 5344 because the former excludes from the compulsory list of allowed contraceptives both emergency contraceptives and the intra-uterine device.[52] And even if article 7 of Law 9073 allows enforcement officers to add new methods of contraception, it expressively states that these methods should coincide with those previously approved of by competent national authorities.

It was thus not the local statute, but the way in which it was enforced by the Executive Power, which included the free delivery of the so-called emergency contraceptives at public health assistance centers, that posed a constitutional problem.[53] The local Court found this enforcement illegal and unconstitutional. Its illegality was grounded precisely on the inconsistency between the *de facto* application and Law 9073, article 6. Its unconstitutionality was based almost exclusively on the principles and rules established by the Argentine Supreme Court in *Portal de Belén*, showing a partially different interpretation from that of the San Luis Court of appeals.

The main difference between the two holdings lies on the reasons for and the scope given to the rule by which emergency contraception should be prohibited due to its abortive effect. As

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51. "Programa de maternidad y paternidad responsables," Ley No. 9073 (Prov. de Córdoba, Dec. 18, 2002).

52. *Id.* at art. 6°.

53. Cámara de Apelaciones en lo Civil y Comercial de 1a. Nominación, sentencia no. 93, "Mujeres por la Vida - Asociación Civil sin Fines de Lucro — filial Córdoba— c/ Superior Gobierno de la Provincia de Córdoba s/ amparo — Recurso de apelación," Expte No. 1270503/36, del 7/8/2008 (Majority: Justices Mario Sarsfield Novillo and Mario R. Lescano. Minority (denying the injunction): Justice Julio C. Sánchez Torres).

stated above, according to the San Luis Court of Appeals, the federal Supreme Court was said to have established, in *Portal de Belén*, a kind of *iure et de iure* presumption that every post-coital contraceptive operates via an anti-implantation mechanism. The Córdoba court, on the other hand, is slightly more cautious. It does not deny the scientific debate regarding the moment of implantation, nor does it consider that *Portal de Belén* has definitively solved its legal relevance. Rather, it establishes that the existence of scientific doubt over the moment of fertilization is a sufficient reason to justify the ban on emergency contraception, and it does so by applying the *pro homine* principle.[54]

4. A Third Look at Portal*: Applying the* pro homine *Principle in Favor of the Woman´s Right to Reproductive Health*

Holding a contrary view, other Justices have interpreted that the *pro homine* principle should be applied in favor of the woman´s right to reproductive health, and, therefore, it should be unequivocally determined that an emergency contraceptive method has an abortive or anti-implantation nature in order to justify its prohibition.[55] Some other Justices have only required "sufficient proof" that the method's operation obstructs implantation in the specific case in which it is prescribed, which does not necessarily amount to certainty.[56]

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54. *See* opinion of Justice Sarsfield Novillo, who confirmed the majority's opinion, *id.* at cons. 11°.

55. Juzgado de 1ra. Instancia en lo Civil y Comercial de 5ta. nominación de Rosario, "Mayoraz, Nicolás Fernando c/ Municipalidad de Rosario," Expte. No. 1455/02 del 18/06/08, cons. V.

56. *See* opinion of Justice Sánchez Torres in "Mujeres por la Vida," *supra* note 53, at cons. 15°. Some Courts dismissed on formal grounds challenges to the constitutionality of decisions regarding sexual health and reproduction from the point of view of the embryo´s right to life. *See* CSJN, "Morales, Rosa Nélida s/ aborto en Moreno" Causa no. 2785, Fallos 319: 3010 (1996); CSJN, "P., F. V. s/ amparo," Fallos 328: 339 (2005) (authorization to induce the labor of an anencephalic fetus). In another case it was ordered that an intra-uterine device be inserted in a minor child, absolutely regardless of the question of its anti-implantation or abortive effects. *See* Cámara de Apelación en lo Civil y Comercial–Sala I- La Matanza, "P. C. S. y C., L. A. s/ fuga del hogar," Expte. No. 167 / 1 Res. Def. No. 4/1, del 18/12/2001.

D. Embryo Status in the Debate Regarding in vitro *Fertilization Techniques*

Like the United States Supreme Court, the Argentine Supreme Court has not yet delivered an opinion on whether assisted human reproduction techniques which, directly or indirectly, lead to embryo discard—i.e., embryo destruction—are constitutional. Even though many bills[57] have been proposed, the issue has not, to date, been regulated by statutory Law. Nevertheless, the issue has been debated and resolved in the judicial realm in different instances.

1. Rabinovich

The first, and most well-known, judicial decision was issued in *Rabinovich*[58] by the Civil Court of Appeals located in the city of Buenos Aires. The case involved a series of measures aiming at enforcing the right to life and health of embryos which, up to the moment the judicial decision was issued, were held under cryopreservation by public or private health institutions in the aforementioned city. The judicial decision, issued unanimously, was grounded in reasoning that was analogous, though not identical, to that adopted two years later by the federal Supreme Court in *Tanus* and *Portal de Belén.*

First, it was found that, from the point of view of Argentine law, personal life starts at conception; this determination was based on a systematic reading of all of the International Human Rights Treaties and Conventions that take constitutional precedence under article 75.22 of the Argentine Constitution. It was also found that

57. As an example, *see* file No. 4423-D-2010, Trámite Parlamentario 080 (22/06/2010), Régimen de Reproducción Humana Asistida y de Crio conservación (Assisted Human Reproduction and Cryopreservation Regime), registered by Silvana M. Giudici, Silvia Storni, Agustín A. Portela and Juan P. Tunessi.

58. CNAC, Sala I, "Rabinovich, Ricardo David s/ medidas precautorias," Expte No. 45882/93, del 3/12/1999.

the principle set forth in article 51 of the Argentine Civil Code,[59] according to which a person is every entity that may show characteristic human features, has constitutional value.

But even though anyone may be considered a person for constitutional purposes, the acknowledgement of the legal status of the embryo requires determining the precise moment when the lawful existence of every person starts. In order to resolve this issue, the Court of Appeals in Buenos Aires applied article 4.1 of the American Convention of Human Rights,[60] as the federal Supreme Court would later do in *Portal de Belén*. Nevertheless, the Court of Appeals, unlike the Supreme Court, paid heed to the devaluation of the protection of the *no nato* that could be seen in the expression "in general", used in this norm. It decided this particular semantic incidence by means of a systematic interpretation that integrated this norm with the interpretative declaration by Argentina on the occasion of the ratification of Children´s Rights Convention, according to which, "child" is defined as any human being as of the moment of conception.[61]

The Court of Appeals, once again unlike the federal Supreme Court in *Portal*, considered the logical possibility that the declarations and reservations contained in international treaties may not have the same hierarchical legal status as the treaty itself. This possibility was neutralized by the phrase contained in article 75.22, Argentine Constitution, under which the treaties have constitutional value "under their actual enforcement conditions" ("*en las condiciones de su vigencia*"). Under the federal Supreme Court precedents, this expression ought to refer to the conditions

59. Art. 51, Cod. Civ. states that "[A]ll beings who show signs characteristic of human beings, without any distinction as to qualities or accidents, are persons of visible existence." In Spanish: "*Todos los entes que presentasen signos característicos de humanidad, sin distinción de cualidades o accidentes, son personas de existencia visible.*"

60. Cited in *supra* note 40.

61. *Supra* note 40.

that effectively regulate the State's obligations at the international level.[62]

As in *Portal*, it was asserted that conception takes place with fertilization. Nevertheless, while in *Portal* the federal Supreme Court grounded this interpretation almost exclusively on the authority of embryonic science, the opinion of the Court of Appeals in *Rabinovich* was based upon a sort of normative slippery slope argument. It stated that all arguments which link legal personhood to the emergence of a particular event, such as the moment of implantation, or the appearance of the nervous system, or even birth, imply that the law doesn´t recognize an equal value to all human life.[63]

Finally, the Court of Appeals held that the embryo and, eventually, the monozygotic twins that emerge from the splitting of the embryo, possess individual personhood. The Court also decided the issue of the humanity and the legal personhood of the pronuclear oocyte (i.e., an embryo at the stage that precedes the fusion of the female and male gametes' nuclei) in the following way: the oocyte had to be dealt with, by law, in the same way as a person, "not by virtue of asserting its personhood . . . but in the light of the doubt that arises from the impossibility to exclude it with certainty. [This doubt] . . . at the factual level, compels us to respect its life and integrity, as if it were a person, a subject of law enjoying those rights."[64]

2. Subsequent Cases

In three cases that arose after *Rabinovich*, the debate regarding the embryonic legal status involved the parents´ claim that the

62. *See* "Rabinovich," *supra* note 58, at cons. VI, *citing* CSJN, "Giroldi, Horacio D. y otro s/ recurso de casación - causa n° 32/93," Fallos, 318: 514 (1995).
63. *Supra* note 58, at cons. VI and VII.
64. *Id.* at cons. VII.

social care institution ("*obra social*")[65] they belonged to should cover the costs involved in assisted fertilization treatment.[66] Opinions delivered in these cases can be ranked incrementally regarding the legal value of the embryo´s life, as follows:

a. The parents´ right to have *in vitro* fertilization procedures covered by medical insurance is affirmed, fully bypassing the problem of the use of un-implanted embryos;[67] or explicitly eluding a decision on embryotic personhood on the basis that it would be a religious question, alien to the scope of intervention by the State;[68] or else rejecting the abortive nature of any fertilization treatment, on the ground that, out of a conceptual necessity, it cannot be considered abortive. None of these opinions referred either to the Supreme Court precedent in *Portal*, or to *Rabinovich*.[69]

b. The parents' 'right to have the *in vitro* fertilization procedure covered by medical insurance is affirmed, and there is a proposal, but without binding force, regarding the possibility of donating the supernumerary or surplus embryos for their later implantation, or alternatively, for their therapeutic use or experimentation.[70]

c. The parents' right to have the *in vitro* fertilization procedure covered by medical care insurance is affirmed, but it is

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65. *Obras Sociales* are health insurance/health care programs that are primarily administered by trade unions for the benefit of the union members and their families (although there are other types of *obras sociales*, such as those administered by each Argentine province for workers in the public sector). They are funded by compulsory payroll contributions by employees and employers.

66. Juzg. CAyT N°6 de la C.A.B.A., "A.M.R. y otros c/ Obra Social de la Ciudad de Buenos Aires," 20/11/07, LL 2008-A, 148, El Dial AA439C (reaffirmed by the CCAyT de la C.A.B.A.); Cámara de Apelaciones en lo Contencioso Administrativo de San Nicolás, "S.A.F y A.H.A c/ IOMA," 15/12/08, LL 2009-A, 408; Cámara Federal de Apelaciones de Mar del Plata, "Loo, Hernán Alejandro y otra c/ IOMA y otra," 29/12/08, available at http://www.cij.gov.ar (last visited Jul. 15, 2013).

67. *See* "A.M.R. y otros c/ Obra Social," *supra* note 66 (opinion of Justice P. López Vergara).

68. *See* "S.A.F y A.H.A c. IOMA," *supra* note 66, opinion of Justice Schreginger, cons. 5°, joined by Justice Cebey.

69. *See* "S.A.F y A.H.A c/ IOMA," *supra* note 66, at cons. 5° (opinion of Justice Schreginger, joined by Justice Cebey).

70. *See* "Loo c/ IOMA," *supra* note 66 (opinion of Justice Ferro).

simultaneously held that legal personhood is recognized from the moment of fertilization, and it is ordered that a guardian be appointed to safeguard their physical integrity, considering the precedent in *Portal* as valid and binding, and joining the opinion delivered by the Court in *Rabinovich*, but not finding that decision binding given the different jurisdictions involved, i.e., national and provincial.[71]

d. The parents´ claim that the infertility treatment be covered by the social care plan is rejected on the basis that it represents a clear threat to the supernumerary or surplus un-implanted embryos´ right to life, as interpreted after the *Portal* decision.[72]

IV. A COMPARATIVE SYNTHESIS FROM THE TELEOLOGICAL AND SEMANTIC POINT OF VIEW

If there is any value in the orderly review of judicial decisions and the grounds for them, this doesn´t rely either on their thoroughness or on their unattainable definitive nature. It relies, instead, on the possibility of drawing comparisons and contrasts of both legal practices regarding processes of conceptual construction and determination, in the light of the claim that fundamental rights are deontological, absolute and/or unconditional.

A. The "Practical" Legal Value of the Embryo´s Life Compared

1. It should be pointed out that U.S. constitutional judicial law in the field of embryonic legal status is much older than the Argentine one. It was only in 2001 that the first judicial decision was issued in Argentina, while the first U.S. precedent, which set

71. *Id*. (opinion of Justices Tazza and Comparato).

72. *See* opinion of Justice Valdez, *id.* at cons. X and XI, especially cons. XI *in fine*. After these cases were decided, the province of Buenos Aires' legislature passed Statute 14208, B.O. 26507 (Jan. 3, 2011), regulated by Dto. 2080/2011, which classified human infertility as a disease, and therefore included *in vitro* fertilization in the so-called "compulsory medical assistance plan", according to which both private and public health insurance plans should include the treatment as a free service.

forth the position of the U.S. Supreme Court regarding the value of unborn ("potential") human life, was issued in 1973.

2. Under the American case law reviewed, the legal value of human life is not uniform; it varies according to the stage of development that an unborn human being has reached. Such stages do not exist in the Argentine Supreme Court case law, which considers that there is a genre ("persons") that embraces the one "to be born" from the moment of conception, and conception occurs on the occasion of fertilization. Not distinguishing stages implies that there is a ban on any action knowingly aimed at interrupting, either in an eventual or probable way, the development of the embryo after fertilization.

3. Embryos and pre-embryos in American case law fit in the first stage ("non-viable potential human life") and are subject to state interest, according to the U.S. Supreme Court. This state interest in the protection of human life is independent from the interest that the holder of the right to life may have over his or her own life.[73] This independence is particularly relevant in order to

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73. This principle was applied forty-four years later as grounds for denying a fundamental right to assisted suicide, in Washington v. Glucksberg, 521 U.S. 702 (1997) *and* Vacco v. Quill, 521 U.S. 793 (1997). The grounds for state interest in human life are discussed in depth, both by those who approve of *Roe* and those who oppose it. Among many others, *see* Alec Walen, *The Constitutionality of States Extending Personhood to the Unborn*, 22 CONST. COMMENT. 161, 178 (2005), who highlights the way in which this claimed interest would threaten the rights stated in *Roe* for women. *See also* James Bopp & Richard Coleson, *Judicial Standard of Review and* Webster, 15 AM. J. L. & MED. 211, 216 (1989). The idea that states hold an interest in human life which is not conceptually linked to personhood was particularly developed by Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 CHICAGO L. REV. 381 (1992). This idea was then picked up by Justice Stevens in Casey, 505 U.S. at 913 n.2; *and* in Washington v. Glucksberg, 521 U.S. at 747. This same conceptual distinction is also present in other constitutional practices, as is shown in the famous leading Spanish case de-criminalizing abortion, T.C., s. no. 53/1985 at FJ5, B.O.E. no. 119, May 18, 1985. For an academic discussion of the plausibility of this distinction *see* certain commentaries on DWORKIN, LIFE'S DOMINION, such as Gerard V. Bradley, Life's Dominion: *A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993); Alexander Morgan Capron, *Philosophy and Theory: Life's Sacred Value - Common Ground or Battleground?*, 92 MICH. L. REV. 1491 (1994); Abner S. Green, *Uncommon Ground*, 62 GEO. WASH. L. REV. 646 (1994); Frances M. Kamm, *Abortion and the Value of Life: A Discussion of* Life's Dominion, 95

protect the life of citizens that have not, as of yet, acquired the ability to express their own interests.

4. The state interest in non-viable potential human life is compelling enough as to justify the binding nature of certain measures aimed at discouraging the decision to abort, but no other practical effect is attached to it. For, although under U.S. case law, un-implanted embryos are said to not be included among property rights, there is no restriction governing the progenitors´ will over embryos where even the will of only one of the parties is sufficient to legally justify their discard.

5. It is unarguable that judicial decisions issued in Argentina recognize more legal value in embryonic life than those in the U.S., which considers that legal value arises only once the time of non-viability is passed. In Argentina, however, even if the limited case law *corpus* in existence shows a generalized acceptance of the general principle that embryonic life is personal life before and after implantation, this uniformity disappears when it comes to determining the constitutionality of rules and courses of action which imply the potential or actual discarding of embryos.

6. In Argentina, the debate over the treatment owed to embryos is primarily focused on the legal effects of fertilization methods that could involve discarding embryos, and on the normative consequences of the scientific debate regarding the anti-implantation mechanism of the emergency contraceptive and the intrauterine device, or any other contraceptive that might operate to prevent embryotic implantation.

7. The discussion over contraceptive and fertilization methods in Argentina assumes—with or without reason, which is not evaluated here—the normative premise that women have a right of

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COLUM. L. REV. 160 (1995) (book review); Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049 (1994) (book review); Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1 (1994); *and more extensively*, Richard Stith, *On Death and Dworkin: A Critique of his Theory of Inviolability*, 56 MD. L. REV. 289 (1997).

access to them. Courts differ in the way in which they weigh this perceived women´s right with the embryo´s right to life, as recognized in *Portal de Belén*, *Tanus* and *Rabinovich*. The contraceptive methods debate is centered upon the weight and sense of the *pro-homine* principle. In particular, it concerns how much certainty this principle requires regarding the anti-implantation element of these methods. Alternatively, this discussion does not arise from the U.S. case law, which, by acknowledging the concept of "non-viable potential human life" and by allowing for the disposal of the embryo itself, undermines the primary assertion of that principle.

B. The Justificatory and Semantic Postulates Compared

Judicial debates regarding the legal status of the embryo will continue unfolding and getting richer and richer, both on the U.S. and Argentine scenes, as long as the social factors that trigger it are present. Still, even at this early stage of development, this comparative synthesis makes evident the unfolding of a semantic-anthropological debate relating to the most radical conceptual distinction in the world of law: that which separates things on the one hand, and persons on the other.

The question at hand is to whom do we give the distinction of person or subject of law, and why. But this question cannot be resolved if there is no previously adopted viewpoint in relation to a more abstract and thus more fundamental, semantic debate: how are things classified in general in the world and, in particular, in the legal world? Are conceptual classifications the result of a reflexive, yet somehow explicit, social debate that the law is destined to adopt, at least as long as there prior consent exists? Are they an interested imposition of a social group that is picked up by the law and clothed with its coactive force? Or are they something similar to a representation of reality, which emerges before us already classified, if not thoroughly, at least partially?

Regarding the embryo´s legal personhood, these questions could be restated in the following way: Do the constitutional judicial practices here reviewed find the personal or un-personal nature of the embryo as the product of some sort of social construction, or do they view it as something already given to understanding, as an *ob*-jectum? Which is the semantic theory implied in the interpretative arguments used in both of the practices here reviewed?

In what follows, we will address these issues by considering three consecutive and intertwined levels of approach: (a) the relation of interpretive arguments to moral and anthropological justificatory stances of interpretation (section 1); (b) the semantics grounding these anthropological and moral stances of interpretation (section 2); and (c) an evaluation of the coherence between the categorical nature of fundamental principles and these semantic approaches to the concept of legal personhood (title V).

1. The Justificatory Perspective of Interpretation Compared

The main interpretative argument sustaining the denial of legal personhood to the unborn in *Roe* was the *contrario sensu* argument: if the constitutional text does not entitle the unborn to legal personhood, then it should be excluded from this legal concept´s system of reference.[74] But as it has frequently been noted, this same constitutional text does not mention either the right to abort, or even the right to privacy—of which abortion is considered to be a concrete application. Facing the silence of the constitutional text, there was space, at least from a logical point of view, both to recognize and to deny legal personhood to the unborn.[75] As was noted above, this interpretative argument

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74. *See supra* notes 8-10.

75. Regarding the logical ambivalence of the *contrario sensu* argument *see* GEORGE KALINOWSKI, INTRODUCCIÓN A LA LÓGICA JURÍDICA 177-79 (J.A. Causabón trans., Eudeba 1973), *and* LUIGI LOMBARDI VALLAURI, CORSO DI FILOSOFIA DEL DIRITTO 95-100 (CEDAM 1981). Regarding the feeble legal grounds for neglecting constitutional personhood for the unborn, *see, e.g.*,

advanced in *Roe vs. Wade* against the acknowledgement of the legal personhood of the unborn was never revisited. All later cases assume, as part of *Roe´*s holding, that all unborn life is not to be considered "personal life" (and not even human life, but "potential human life").[76]

The logical ambivalence of the interpretative argument shows that the actual reason sustaining the majority´s decision in *Roe*—and in the subsequent cases which assume without discussion that the unborn is not a person according to the Constitution—is a moral and anthropological conception of the person, which is assumed as the obvious, and thus not explicitly stated, justificatory point of constitutional practices. A moral conception according to which the faculty for autonomy grounds the right to be treated with "equal respect and consideration," as assumed in the constitutional concept of "privacy."[77] And an anthropological concept of person, by which it is this same faculty (autonomy) that distinguishes human beings from other species.

Although the Argentine Supreme Court in *Tanus* and *Portal* had to deal with much more explicit texts regarding the legal status of the unborn (recognizing its legal personhood and a right to life from the moment of conception), none of these texts explicitly states the moment when conception takes place, nor which kind of legal protection is due to the unborn. Perhaps aiming to profit from the credibility of scientific discourse, the Argentine Supreme Court

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Charles Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in the Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, at 361 (2006/2007); *or* Martin Ronheimmer, *Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy: A Constitutionalist Approach to the Encyclical* Evangelium Vitae, 43 AM. J. JURIS. 135, 158-59 (1998). In any case, even some of those who approve of the decision in *Roe* notice that neglecting the constitutional personhood of the unborn is a main dimension of the case´s holding. *See* Jack M. Balkin, *How Genetic Technologies will Transform* Roe vs. Wade, 56 EMORY L. J. 843-64, at 845 (2007).

76. *See supra* notes 13-22, 28-36.

77. This teleological assumption was explicitly stated in Casey, 505 U.S. at 852.

in *Portal* based its interpretation concerning the moment of conception almost exclusively on geneticists´ findings.[78] Nevertheless, it should be noted that the American Supreme Court in *Roe*—and all the other Courts which relied upon this decision—utilized the same scientific concepts and findings, and still attributed to them different practical (moral and legal) consequences.

The availability of these scientific findings for all of the Courts—Argentine and North-American—dealing with the embryo´s status shows the Argentine Supreme Court decision in *Portal* was not only grounded in the scientific description of human life, but also in the moral concept of "person," from which this scientific data was interpreted. For the main question being posed to all of the Courts was not, "when does genetics situate the appearance of a new human being?", but rather the anthropological and moral question, "when should dignity, and thus legal personhood, be recognized in a new human being?" The underlying reason sustaining the majority interpretative conclusion in *Portal* is thus the concrete answer to this question: the reference of the concept of dignity is co-extensive with the reference of the concept of human nature, independent of the factual possibilities of it being actualized.

2. Implied Semantics Theories Compared

The different legal status granted to the embryo in one constitutional case law practice or the other is due not only, nor primarily, to textual differences, but also to the use of different moral conceptions of the person as teleological or justificatory stances of interpretation. Stated in this way, it should be considered if and how the Courts link this justificatory stance of interpretation to the semantic meaning of the texts, and which are the epistemic

78. *See supra* notes 13-22, 28-36.

and semantic theories implied in the use of these justificatory stances. In fact, both questions are closely related.

Scientific, moral and anthropological approaches to the nature and value of human embryos are explicitly passed over in American case law concerning the legal status of the embryo. It is as if Wittgenstein´s theory of "language games" had been radically interpreted and the "legal game" had been taken to be completely alien to other "language games" where the concept of personhood was also the object of discussion, and particularly, where an insight into an "outside" world seemed to be allowed.

This aspiration for the autonomy of legal language from other fields of language, be it morals or science, discloses at least two semantic assumptions. First, that the justificatory viewpoint of interpretation is internal to the legal practice, and second, that the frame of reference of legal concepts is absolutely determined by their use within the practice. In effect, if the legal concept of personhood bears no relation to the moral concept of the person, or even to scientific findings about human life, it seems that the legal concept is nothing more than a product of legal decisions. It is not surprising, then, that arguments determining the legal value of the embryo were always grounded on the way the Constitution "uses" the concept of person; or on the presumed intention of the Constitutional authors *when using* constitutional concepts; and on the absence of precedents recognizing legal personhood in unborn life, and thus, on the fact that the concept of legal personhood has not yet been used in reference to the embryo.[79]

This semantic assumption, by which the use of legal concepts within the legal community is the only criteria for determining its frame of reference, also seems applicable to the concept of "special respect" that is owed to embryos as an intermediate category between things and persons. In effect, this concept, introduced to legal practice in *Davis v. Davis,* is not founded upon any insight

79. *See supra* notes 8-10.

into the value of human life as considered from a natural, metaphysical, or even a conventionally moral point of view. It is, instead, exclusively grounded on a kind of extension of other legal concepts, which have been used for a longer time. It is like a mix of the concepts of "property," "born human life," and "unborn but viable human life."[80] And being a mix of all three, it has neither the same significance nor, of course, the same legal force, as the third of the three. That is why this "special respect" amounts to less than nothing from a practical point of view, for if there is a rule concerning the destiny of embryos, it is that they should be discarded in case of disagreement between the progenitors.

Argentine case law is not as uniform as the American one in the degree to which the connection is acknowledged between different "language games," and the semantic theory implied therein. The metaphysical and moral perspectives of interpretation do not seem clearly acknowledged in *Portal* and *Tanus*, where the legal status of the embryo is asserted as a necessary conclusion based on scientific and legal statements.[81] It is plainly stated in *Rabinovich*, where, in the face of both the textual indeterminacy concerning the embryo´s legal status and the fact of scientific discussions concerning the moment when a new human being appears, the Court of Appeals based its interpretation of the embryo as a legal person on the moral and legal *pro homine* principle.[82]

In any case, this more or less open recognition that the legal "language game" is connected to the scientific and moral ones expresses both the conviction that legal concepts are not purely constructed from the inside of the legal practice, and that something exists prior to human social practices and language which claims respect.

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80. *See supra* note 30.
81. *See supra* notes 38-41.
82. *See supra* notes 58-64.

Nevertheless, it should be noted that it is also clear that all of the Argentine Courts complemented this attention to the biological and moral nature of a human person with the actual use of the concept itself within the legal practice, when interpreting the concept of legal personhood. The role of use within the legal practice was particularly relevant when the question was not to determine the definition of legal personhood, but rather what the legal consequences of recognizing the entitlement to legal personhood are; or how the law should deal with scientific doubts concerning the moment when fecundation takes place;[83] or the way contraceptives operate. These questions were, in all cases, approached with interpretative rules internal to the Argentine legal practice, such as the principle of *pro homine.*

As mentioned above, not all Argentine Courts enforced this principle with the same consequences. Some of them applied it in favor of the mother´s assumed right to conceive children, and others in favor of the life of the embryo. Two related explanations can be advanced for this disagreement. In the first place, the proposition referred to by the legal statement "*pro homine*" is not at all evident or manifest. It is not evident if the principle is an appropriate ground for determining who is entitled to its protection, nor is it clear who should benefit when its enforcement postpones another person´s claimed rights.

Second, precisely because of this lack of manifestation, its practical significance differs according to the concept of justice from which each interpreter determines the global and final justificatory point of law. The more this concept of justice is attached to privacy and moral autonomy, the less value is attributed to the life of an embryo, which corresponds to less entitlement to legal protection. On the contrary, the more the concept of justice is attached to dignity as a universal and non-variable claim of respect—related to the concept of moral

83. *See* "Rabinovich," *supra* note 58.

autonomy, but not to be confused with it—the more value is attributed to embryotic life, resulting in a greater entitlement to legal protection.

V. WHICH SEMANTIC THEORY SHOULD GOVERN LEGAL PRACTICE?

Two semantic strategies and conceptions underlie the two legal practices compared here: a traditional, or "criterial," semantics on one side, and a sort of "light"—with ample space for social construction—realist semantics on the other. The last question to be posed is: which of these is more coherent with the categorical and universal nature of fundamental rights?

The discussions regarding which is the semantic *praxis* that better fits these features of fundamental rights are too ample to be reviewed in this article. However, it seems appropriate, at least, to point out that they lead us back to the basic choice that was stated above, i.e., either the fundamental rights principles are social constructions that precede and determine their own frame of reference; or else their reference—some basic human good—precedes and determines its meaning.[84]

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84. As is well known, the alternative between giving priority to reference over meaning when determining the sense of concepts was stated and developed in the field of Philosophy of Language by SAUL KRIPKE, NAMING AND NECESSITY (Blackwell 1980), *and* Hillary Putnam, *Meaning and Reference*, 70 J. OF PHIL. 699 (1973). These theories were applied to the problem of legal interpretation by Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 59 FORDHAM L. REV. 2087, 2091 (2001), among other works; *and*, with some differences, by NICOS STAVROPOULOS, OBJECTIVITY IN LAW (Clarendon Press 1996), *and* David O. Brink, *Legal Interpretation, Objectivity and Morality* in OBJECTIVITY IN LAW AND MORALS 12-65 (Brian Leiter ed., Cambridge Univ. Press 2001). For a critical revision of these theories *see* Brian H. Bix, *Can Theories of Reference and Meaning Solve the Problem of Legal Determinacy?*, 16 RATIO JURIS 281-95 (2003). Regarding the limitative role of semantics in interpretation out of the English language field, *see, e.g.*, JERZY WRÓBLEWSKI, SENTIDO Y HECHO EN EL DERECHO 108 (Francisco Javier Ezquiaga Ganuzas & Juan Igartua Salaverría trans., Fontamara 2001; vol. 9 in the DOCTRINA JURÍDICA CONTEMPORÁNEA series), *and* Pilar Zambrano, *Los derechos ius-fundamentales como alternativa a la violencia. Entre una teoría lingüística objetiva y una teoría objetiva de la justicia*, 60 PERSONA Y DERECHO 131-152 (2009).

If the meaning or concept of fundamental rights is exclusively the product of a more or less controlled social construction, and more importantly, if a construed meaning determines its own field of reference, it would be extremely hard to predicate the universality and absoluteness of fundamental rights principles. By contrast, their extension as its categorical or absolute nature would depend upon the will for a social construction of meaning to lead. Some political philosophers supporting this constructive approach to fundamental rights principles have openly admitted that it is irreconcilable with their categorical and universal nature, particularly when applied to the legal concept of personhood.[85]

Others are much more reticent to admit this openly. Thus, Ronald Dworkin has expressly rejected what he deems to be a criterial semantic approach to law, according to which all legal concepts—including the concept of law itself—are constructed from inside the practice, with no other basis than the sheer fact of a convergence of their criteria in use within the practice. Against this claim, Dworkin contends that legal concepts are interpretative and thus there is no need of fundamental convergence in their use.[86] Additionally, he has pointed out that legal and political concepts are the product of a collective constructive practice in the light of moral and political values and, in the end, in the light of a substantive conception of what qualifies as a good life. In this sense, he aims to distinguish himself not only from classical positivistic approaches to law, which claim the neutral nature of the constructive process of legal concepts, but also from Rawls' Theory of Justice, which aspires to exclude "comprehensive conceptions" from the constructive process of political values.[87]

Ronald Dworkin's answer to them both is that all interpretative concepts are the product of a holistic constructive practice that

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85. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 20 (expanded ed., Columbia Univ. Press 2005).

86. *See* DWORKIN, LAW'S EMPIRE, *supra* note 2, at 46; DWORKIN, JUSTICE IN ROBES, *supra* note 2, at 12, 151.

87. *See* DWORKIN, JUSTICE IN ROBES, *supra* note 2, at 160-61, 225-26.

synthesizes natural, moral, legal, and political concepts. This holistic account seems much more faithful to legal practice than the "criterial one." In effect, as has been shown above, both the Argentine and the American Courts rely on a holistic approach to the concept of legal personhood, no matter how much they both try to disguise this fact.

Now, as we have previously mentioned, it is obvious that criterial semantics implies a negative answer to the question of deference to reality. But the opposite is not obvious. For the question is not only to what degree are legal concepts related to moral, political or natural concepts, but also, if anything exists prior to the whole conceptual constructive process itself. To this Ronald Dworkin would answer "no," or better, "it doesn´t matter": the only basis for the whole constructive process is a "reflective equilibrium" between coherence and conviction.[88] But this mix of conviction and coherence is all that Dworkin claims for moral objectivism.

There is no place in his theory—nor any need, according to him—for self-evident or self-justified practical propositions, or for the claim that these propositions bear any relationship with human nature.[89] And it should be noted that although self-justified, practical propositions are generally the object of moral and political convictions, this is not always the case or, much more importantly, their epistemic justification.

Now, without reference to self-justified practical propositions, there is no critical instance with which to confront the whole conceptual constructive process.[90] Instead, if reference leads the

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88. *Id.* at 162.

89. *Id.* at 226-27, *and* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 118 (1996).

90. Both the possibility of grounding moral and legal objectivity in self-evident practical principles, and the possibility of acknowledging a connection between these principles and natural human ends, has constantly been defended by the New Natural Law school of thought and, especially in the field of law, by John Finnis. *See*, among many other works, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS Ch. 23-24 (Clarendon Press 2011); *and* John Finnis,

abstraction of meaning, when legal authorities construe intricate and obscure meanings (as, in fact, they have already done in relation to the legal concepts of "person" and "special respect"), the reality referred to by these legal and moral concepts would make clear that there is abuse in the use of language. For no matter how much *imperium* courts may have to construct and reconstruct concepts in the social sphere in general, and in the world of law in particular, they lack the power to transform, and least of all to deny, the referential frame of this construction. In other words, if reference precedes meaning, then human or fundamental rights principles and their characteristic universality—for each and every one—and absoluteness, in all cases, would be invulnerable to the abuses of language.[91]

Having reached this stage of the discussion, it is worthwhile to ask, one last time: which semantic practice better fits the conceptual, and therefore the necessary, characteristics of human rights? A practice that construes concepts from a vacuum, or a practice that construes them from a grasp of reality? In this latter case, how does the reality referred to by the concept of human rights narrow the construction of the legal concept of person? Is it not by imposing the only condition that its admittance be universal for every man, and absolute in each and every situation?

Introduction to 1 NATURAL LAW at xi (John Finnis & Carolyn Dever eds., Dartmouth Press 1991; published as part of THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY series).

91. For an approach to the constructivist semantics that underlies the line of cases following *Roe, see* John M. Breen & Michael A. Scaperlanda, *Never Get Out the Boat.* Stenberg vs. Carhart *and the Future of American Law*, 39 CONN. L. REV. 297, 304 (2006).