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## **Legal Memorandum on the Mississippi Personhood Amendment**

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This memorandum of law has been prepared by Liberty Counsel in order to offer guidance on the Mississippi Personhood Amendment, Initiative Measure No. 26.

Liberty Counsel is a national public interest law firm specializing in constitutional law, particularly in freedom of speech, religious freedom and church-state matters. We have presented many briefs before the United States Supreme Court, and we have argued before the High Court and in many state and federal courts. Liberty Counsel has offices in Florida, Virginia, Texas and the District of Columbia, and hundreds of affiliate attorneys.

This memorandum of law provides an overview on the language of the proposed Amendment.

### **Introduction**

It has been said that a society may be judged by its treatment of the most vulnerable within it. Americans are a generous and caring people, lending humanitarian aid all over the world when disaster strikes. Stories such as Baby Jessica falling into the well in west Texas and her courageous rescue made headlines all over the nation for days on end.

When it comes to the life of the unborn, though, we are often conflicted. On one hand, we want to help the poor, single mother who cannot seem to make ends meet and did not intend to become pregnant, but on the other we instinctively feel for the little child in her womb and its ultimate fate. We tend to be both for and against abortion depending on various circumstances and what we ate for breakfast that morning.

Double-mindedness is never a virtue. When it occurs in the context of arguably the most serious moral issue of our time, it is fatal, both to the precious unborn child and, eventually, to the nation as a whole.<sup>1</sup> The Personhood Amendment appears to be an

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<sup>1</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973) (criticizing the State of Texas for its inconsistencies in arguing that the fetus is a person but not treating it as such in the law: "If the fetus is a person, why is the woman not an accomplice? Further, the penalty for criminal abortion

attempt to set forth a principled position on the issue of the protection of human life from its very beginnings, whether naturally or artificially created.

## Legal Analysis

In order to put the proposed Amendment in the proper perspective, a brief review of the history of our legal system and the balance of powers in our federalist structure is necessary.

### A. Background

The Declaration of Independence unequivocally declares what every human being instinctively knows at some level: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration is our nation's charter, and should by right have the force of law. The legitimacy of our federal Constitution and our government itself is dependent on its harmonizing with and protecting the "unalienable" rights recognized (but not created) by the Declaration.

The most basic of these rights is the right to life. As Justice Adrian Burke wrote in his superb dissent in an early New York case purporting to confer a "right" to abortion, "the American concept of a natural law binding upon government and citizens alike, to which all positive law must conform, leads back through John Marshall to Edmund Burke and Henry de Bracton and even beyond the Magna Charta to Judean Law."<sup>2</sup> To concede to the state, and to a mere majority of nine unelected judges at that, the power to define what is human and so condone the slaughter of innocent children by the millions is to abrogate our national charter and arrogate to the government a supremacy that would make our founders shudder. The right to life supersedes all government decrees; a human being is not the mere creature of the state.

Moreover, as initially envisioned by the founders, the various branches of the federal government would owe their very existence to the states. See, e.g., THE FEDERALIST No. 45 (Jas. Madison). "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* It is generally accepted that absent these assurances, the Constitution would not have been ratified in the first place.

To further buttress this limitation on the scope of the authority of the federal government, and to satisfy the many anti-Federalists, the Tenth Amendment was adopted by the very first Congress. It provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It thus expressly limits the powers of the federal government, and affirms the sovereignty of the states in all matters not expressly delegated to the federal

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specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?").

<sup>2</sup> *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 200, 206, 286 N.E.2d 887, 335 N.Y.S.2d 390 (N.Y. 1972) (Burke, J., dissenting).

government.

For many years of our nation's history, this limitation on the federal government proved generally effective, and the protection of the rights of our citizens was largely a result of the bill of rights in the constitutions of the various states, not those in the federal Constitution. In fact, it was not until well into the twentieth century that the federal Constitution's protections were applied against the states.<sup>3</sup>

It may be persuasively argued that the current system, whereby the United States Supreme Court sits as the ultimate arbiter of the rights of our citizens, has *decreased* our freedoms rather than *increased* them. The issue of abortion is a case in point.<sup>4</sup> The Court's unconstitutional assumption of the role of superlegislature has also exacerbated rather than alleviated the controversy and heated national debate on such issues as abortion and homosexual rights.<sup>5</sup> The proposed Amendment appears to be intended to help restore some of the balance between state and national government that has been lost over the recent past.

Certainly, with respect to the interpretation of state constitutional rights, state courts

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<sup>3</sup> See, e.g., *Walz v. Tax Commission*, 397 U.S. 664, 701 (1970) (Douglas, J., dissenting) ("Nationalization of many civil liberties has been the consequence of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in State law" until "incorporation" of certain Amendments against the states).

<sup>4</sup> See *Lawrence v. Texas*, 539 U.S. 558, 591-592 (2003) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justice Thomas):

What a massive disruption of the current social order, therefore, the overruling of *Bowers* [*v. Hardwick*, upholding law against sodomy] entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of, and restrictions upon, abortion were determined legislatively State by State. *Casey*, however, chose to base its *stare decisis* determination on a different "sort" of reliance. "[P]eople," it said, "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U.S., at 856, 112 S.Ct. 2791. This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted*\*592 the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired). Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

<sup>5</sup> See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 995-996 (1992) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justices White and Thomas): *Roe's* mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. . . . *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roearia*, that the Court's new majority decrees.

should have the final say. Thus, a state constitutional amendment ought, in the first instance, to be a matter for interpretation by state courts, not federal. Nonetheless, it cannot be gainsaid that the final word on the constitutionality of the Amendment will undoubtedly be pronounced by the federal courts under our current system.

## B. The Language of the Amendment

The operative language of the Amendment provides: "**Section 33. Person defined.** As used in this Article III of the state constitution, 'The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof.'"

### 1. "Moment of Fertilization"

The phrase "moment of fertilization" refers to the very beginning of human life when conceived either naturally or by in vitro fertilization. As stated by the American Bioethics Advisory Commission, "Due to advances in scientific biotechnology, we know with no doubt whatsoever that a human life begins at the moment of fertilization."<sup>6</sup> The Amendment thus extends equal protection of the laws to every human being from the earliest stages of life.

Most of us would likely use the more familiar term "conception" rather than "fertilization," but that term has been subjected to confusion and varying interpretations by some in the scientific, medical, and/or bioethics fields, thus rendering it less precise for purposes of the Amendment.<sup>7</sup>

Clever opponents of measures such as this one have suggested that the phrase "moment of fertilization" is imprecise, or that fertilization is a process. Of course, anyone can offer alternative understandings of any phrase he chooses. But the medical literature is replete with use of this very phrase. In fact, before being appointed to the Supreme Court, Justice Harry Blackmun, author of the majority opinion in *Roe v. Wade*<sup>8</sup>, served as General Counsel to the Mayo Clinic. The Mayo Clinic's Chief Geneticist during that period was Dr. Hymie Gordon. Dr. Gordon himself wrote:

From *the moment of fertilization*, when the deoxyribose nucleic acids from the spermatozoon and the ovum come together to form the zygote, the

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<sup>6</sup> Letter from Fr. Joseph C. Howard, Jr., Executive Director of American Bioethics Advisory Commission, to National Institutes of Health, circa January, 2000. See also Sherman J. Silber, M.D., "In Vitro Fertilization," The Infertility Clinic of St. Louis: "For conception to occur, twenty-three chromosomes from the husband's set of forty-six, and twenty-three chromosomes from the wife's set of forty-six, must meet **at the moment of fertilization** and become an embryo with a new normal set of forty-six chromosomes." (available online at [www.infertile.com/infertility-treatments/ivf-in-vitro-fertilization.htm](http://www.infertile.com/infertility-treatments/ivf-in-vitro-fertilization.htm)) (emphasis added).

<sup>7</sup> For example, the American College of Obstetrics and Gynecology has (re)defined conception as "implantation." See EC Hughes and Committee of Terminology of the American College of Obstetricians and Gynecologists, *Obstetrics-Gynecologic Terminology* (Philadelphia: F.A. Davis, 1972).

<sup>8</sup> 410 U.S. 113 (1973).

pattern of the individual's constitutional development is irrevocably determined, his future health, his future intellectual potential, even his future criminal proclivities are all dependent on the sequence of the purine and pyrimidine bases in the original set of DNA molecules of the unicellular individual.<sup>9</sup>

It is beyond question that biologically and scientifically, from the first instant of its creation, the tiny embryo is alive, and it is distinctively human. Even the cases relied on by the Supreme Court in *Roe v. Wade* to deny personhood to the unborn acknowledged this undeniable fact:

It is not effectively contradicted, if it is contradicted at all, that *modern biological disciplines accept that upon conception* a fetus has an independent genetic 'package' with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. *It is human*, if only because it may not be characterized as not human, *and it is unquestionably alive.*<sup>10</sup>

Accordingly, it would appear that the intent of the Amendment is to protect human life from its inception, i.e. "from the moment of fertilization."

## 2. Cloning

Human cloning has been defined as: "The asexual production of a new human organism that is, at all stages of development, genetically virtually identical to a currently existing or previously existing human being."<sup>11</sup> Many scientists and others differentiate between "reproductive cloning," or cloning to produce children, and "therapeutic cloning," or cloning for the purpose of treating disease. But in fact, both processes create human life: "all human cloning intends and issues in the production of a cloned human embryo, a being distinct from the components used to generate it, a new human being in the earliest stage of development or reproduction."<sup>12</sup>

While cloning may not be a household word, most of us have heard of embryonic

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<sup>9</sup> Hymie Gordon, M.D., "Genetical, Social and Medical Aspects of Abortion," *South African Medical Journal*, pp. 721-30 (July 20, 1968) (emphasis added). See also *Mosby's Medical dictionary* (7th Ed. 2006), defining "embryo" as "name for the developing young of an animal or plant. In its widest definition, the embryo is the young from the *moment of fertilization* until it has become structurally complete and able to survive as a separate organism." (Emphasis added).

<sup>10</sup> *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 200, 286 N.E.2d 887, 888-889, 335 N.Y.S.2d 390, 392 - 394 (N.Y. 1972) (emphasis added).

<sup>11</sup> HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY, ch. 3, "On Terminology," President's Commission on Bioethics (July 2002) (available online at [www.bioethics.gov/reports/cloningreport/appendix.html](http://www.bioethics.gov/reports/cloningreport/appendix.html)) (hereafter, "HUMAN CLONING").

<sup>12</sup> HUMAN CLONING, ch. 3.

stem cell research (a form of “therapeutic” cloning). In fact, President Obama recently announced that federal funding for embryonic stem cell research would be made available in the name of science. Embryonic stem cell research entails cloning; without cloning there can be no stem cell research. Consequently, cloning is not a “some day” issue, but today’s issue. Whether the cloning is for the purpose of reproducing humans or for use in therapy, the undeniable truth is that “the initial product of somatic cell nuclear transfer is a living (one-celled) cloned human embryo.”<sup>13</sup> As such, the unborn child created by cloning is entitled to protection under the law on the same basis and to the same extent as the child conceived in the womb.

The Mississippi Personhood Amendment would protect all unborn children, however created, whether naturally or artificially, whether by pregnancy, in vitro fertilization, or cloning. As stated on the Petition form itself, the intent of the Amendment is “to protect all human beings, irrespective of age, health, function, physical or mental dependency or method of reproduction, from the beginning of their biological development.” Taking innocent human life is unacceptable, period. The Catholic Bishops of Texas put it well: “The fact is that human life is sacred and to intentionally destroy innocent human life for medical research purposes is ethically unacceptable.”<sup>14</sup>

In addition to the President’s Executive Order devoting federal monies to embryonic stem cell research, Congress has passed the Omnibus spending bill (H.R. 1105), which has removed virtually every pro-life restriction and provision on spending, including the protections for health care providers who have a conscientious objection to providing services such as prescriptions for the so-called “morning after” pill (RU 486). Some have called this the most pro-abortion Congress ever elected. These actions would appear to highlight the need for prompt action on the state level to protect life, and were likely among the motivations of the drafters of this Amendment.

It has been suggested that inclusion of the word “cloning” in the Amendment would condone or legalize human cloning. We do not agree. The Amendment serves to effectively ban human cloning for use in the harvesting of embryonic stem cells. Embryonic stem cell research constitutes an imminent threat to life.

Human cloning for the purpose of reproduction, on the other hand, is universally abhorred, is banned internationally, and President Obama emphasized that his actions in removing President Bush’s ban on federal funding for embryonic stem cell research was by no means meant to suggest that he was in favor of reproductive human cloning. Therefore, reproductive human cloning is at most a remote threat to human life in this country at present.

While the Amendment would confer legal rights on human embryos whatever the

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<sup>13</sup> *Id.*

<sup>14</sup> Statement by the Catholic Bishops of Texas on Human Embryos and Human Cloning (May 23, 2005). See also Statement of Professor Robert P. George, J.D., D. Phil., McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University and a member of the President’s Council on Bioethics: “Cloned embryos therefore ought to be treated as having the same moral status as other human embryos.” HUMAN CLONING, App.

reason for their creation, we view the Amendment as erecting a *de facto* **ban** on cloning, by conferring constitutional rights on the cloned human at the earliest stages of life, just as it also confers those same rights on the tiny human in a mother's womb. In effect, the Amendment states that *if* one clones a human being, then that human being cannot be destroyed without due process of law. The Amendment is silent as to the reasons behind the creation of life, whether natural or artificial.<sup>15</sup>

Accordingly, just as the Amendment does not operate as a ban on pregnancy outside of marriage (a matter for the legislature via the criminal law), so it does not address *why* a human clone is created. This Amendment is a mere definition of "person;" a complete ban on human cloning is beyond its scope.<sup>16</sup>

### C. Effect of the Proposed Amendment on State Law

#### 1. Effect on abortion rights

Mississippi is in some respects unique among the fifty states with respect to abortion. Due to its strong legal restrictions and the fact that it now has only one abortion clinic remaining operative within its borders, Americans United for Life, a national pro-life organization, has called Mississippi "the safest place in America for an unborn child."<sup>17</sup> However, if FOCA is passed, as appears highly likely, then overnight Mississippi will become as dangerous a place for the unborn as every other state in the Nation, because FOCA will invalidate every one of those restrictions.

The Personhood Amendment, if passed into law, would serve as something of a pre-emptive strike against FOCA. By adding to Article III of the Mississippi Constitution, which sets forth the state's bill of rights, a new section defining the word "person" as used in that Article, the proposed Amendment would expand application of that term to include the unborn. Although the word "person" or "persons" occurs twelve times in Article III, the vast majority of such occurrences would not be affected by the Amendment.<sup>18</sup> Most importantly, however, Section 14 guarantees that no "person" shall be deprived of "life, liberty, or property except by due process of law."

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<sup>15</sup> Indeed, it may be logically inferred that those who object to the Amendment on this basis would apparently remove all legal protections from those who were created by means of human cloning, thereby sanctioning the killing of innocent children for the sins of their fathers.

<sup>16</sup> It should be noted that the National Conference of State Legislatures has assimilated an excellent chart detailing various state laws banning human cloning. See [www.ncsl.org/programs/health/Genetics/rt-shcl.htm](http://www.ncsl.org/programs/health/Genetics/rt-shcl.htm). For assistance in drafting a statute for your state, please contact Liberty Counsel at [www.LC.org](http://www.LC.org).

<sup>17</sup> See Press Release of October 11, 2004, [www.aul.org/Media](http://www.aul.org/Media).

<sup>18</sup> For example, Section 10 addresses treason, and states that no "**person** shall be convicted of treason unless on the testimony of two witnesses." (Emphasis added.) Similarly, Section 12 protects the right of citizens to keep and bear arms "in defense of his home, **person**, or property." (Emphasis added.)

Consequently, upon passage of the Amendment the unborn would be “persons” entitled to due process of law before they could be deprived of their lives. In theory, then, the courts or the legislature could grant the unborn child or her representative a hearing, and make a judicial determination that her life should be taken. In practice, though, it is difficult if not impossible to imagine a basis for depriving the innocent child of life in the womb. Surely it would require the most compelling circumstances, at the least. As candidly admitted by the court in *Abele v. Markle*<sup>19</sup>: “Indeed, it is difficult to imagine how a statute permitting abortion could be constitutional if the fetus had fourteenth amendment rights. . . . We do not believe [even] such circumstances [as saving the mother’s life] could justify terminating the life of a person with fourteenth amendment rights.”

The Mississippi Constitution of 1890 does not mention abortion by name. However, the Mississippi Supreme Court has construed it as protecting the “right” to abortion in the case of *Pro Choice Mississippi v. Fordice*.<sup>20</sup> At a minimum, then, passage of the Personhood Amendment would have the immediate effect of reversing that decision and emphatically settling that abortion is not protected under the Mississippi Constitution.

## 2. Effect on cloning

President Obama’s Executive Order allowing federal funding of embryonic stem cell research and revoking the ban imposed by President Bush under Executive Order 13435 and its predecessor raise the prospect of the harvesting of stem cells for research purposes in Mississippi. As of today, Mississippi law does not prohibit either human cloning or the destruction of human embryos for stem cell research.<sup>21</sup>

As noted above, passage of the Personhood Amendment would effectively ban the harvesting of embryonic stem cells for destruction in Mississippi, because the tiny embryos created by cloning would be protected under Article III, Section 14 and its guarantee of due process of law before depriving any “person” of life. Significantly, this effective ban on therapeutic cloning would arguably become law regardless of the outcome of any legal challenge based upon the purported effect of the Amendment on the federal right to abortion.

Although the Amendment would not erect an outright barrier to so-called reproductive cloning, such a prospect presents no imminent threat at present. For instance,

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<sup>19</sup> 351 F.Supp. 224, 228 -229 (D.Conn. 1972) (cited with approval in *Roe v. Wade*).

<sup>20</sup> 716 So. 2d 645, 654 (Miss. 1998) (“Just as the United States Supreme Court has recognized that the federal constitutional right to privacy protects a woman’s right to terminate her pregnancy, we find that the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion.”).

<sup>21</sup> As of the time of the writing of this legal memorandum, legislation has been introduced that would ban the use of state money by the University of Mississippi Medical Center “for research that kills or destroys an existing human embryo.” See, e.g., “House votes to ban embryo research,” the Natchez Democrat, March 13, 2009 (available online at [www.natchezdemocrat.com/news/2009/mar/13/house-votes-ban-embryo-research/](http://www.natchezdemocrat.com/news/2009/mar/13/house-votes-ban-embryo-research/)). However, even if the bill becomes law, its reach is limited to the use of state money by a state institution, leaving open the distinct possibility of private entities engaging in the destruction of human embryos.

President Obama's signing statement at the time of issuing his Executive Order calling for federal funding of embryonic stem cell research emphatically declared his own opposition to reproductive cloning: "And we will ensure that our government never opens the door to the use of cloning for human reproduction. It is dangerous, profoundly wrong, and has no place in our society, or any society."<sup>22</sup>

#### **D. Effect of the Proposed Amendment on Federal Law<sup>23</sup>**

Thirty-six years after the Supreme Court's decision in *Roe v. Wade*, abortion on demand remains legal and readily available in all fifty states in the union, at almost any stage of pregnancy. National pro-life organizations which have voiced opposition to personhood amendments have in virtually every case favored a slow, incremental approach to ending abortion. While many of their legislative achievements have decreased the number of abortions, they have failed to end the practice or to directly confront the immorality of abortion.

Moreover, upon enactment of FOCA, every single restriction on abortion, state or federal, will be instantly invalidated<sup>24</sup>, and we will find ourselves no better off in combating abortion than we were the day after *Roe v. Wade* was decided. Even if FOCA is not passed into law, there is no alternative to a personhood approach that offers any chance of ending abortion in the foreseeable future. If this be progress, we want no part of it. The blood of fifty million (50,000,000) innocent children cries out for justice and vindication, and the judgment of God is being visited upon us for this egregious national sin.

Predicting the effect of the Mississippi Personhood Amendment on federal law is difficult, because it is speculative to foretell the outcome of the various possible legal challenges and the rulings of different federal judges. Nevertheless, it may be safely assumed based on past practice<sup>25</sup> that a pro-abortion group would quickly file suit to assert that the Personhood Amendment impinges on the federal right to abortion, and that the federal right trumps even a state constitutional provision that limits that right.

It may also be safely assumed that the federal district court would find the Amendment unconstitutional under the federal Constitution under *Roe* (since lower federal courts are generally loathe to question Supreme Court pronouncements). However, that outcome is by no means certain, given the unique legal questions presented by the

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<sup>22</sup> See Remarks of President Barack Obama – As Prepared for Delivery, Signing of Stem Cell Executive Order and Scientific Integrity Presidential Memorandum, Washington, DC, March 9, 2009 (available online at [www.whitehouse.gov](http://www.whitehouse.gov)).

<sup>23</sup> The Mississippi Personhood Amendment would have no effect on federal law with respect to cloning because there are no federal laws guaranteeing any such "right." Therefore this section will focus exclusively on the effect on the so-called federal right to abortion.

<sup>24</sup> See, e.g., Statement of Sen. Barbara Boxer: "FOCA supersedes any law, regulation or local ordinance that impinges on a woman's right to choose." (January 22, 2004, when introducing the bill in a previous legislative session) (available at <http://www.nrlc.org/FOCA/FOCA%20Boxer%20press%20release.pdf>).

<sup>25</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (state partial birth abortion law held unconstitutional as "undue burden" on woman's right to abortion).

Personhood Amendment. It cannot be emphasized too strongly that the Amendment does nothing more than define the word "person." It does not criminalize abortion or otherwise enact law. What it does is set forth a constitutional principle that would apply to *all* persons in all applicable situations under the Mississippi Constitution.

Further, if the case were to reach the Supreme Court, the issue would pit the right of a state to define "person" under its own constitution as against the right of the federal government to overrule that definition, even where, as here, the federal Constitution does not specifically define the term.

Many courts have expressly recognized the right of states to define "person" in a manner more protective of the unborn, even when upholding a right to abortion.<sup>26</sup> Moreover, even in the worst case, there is a powerful educational component to the Personhood Amendment. The partial birth abortion cases provided opportunities to demonstrate to the world the grisly practices that pass for "medicine" in abortion clinics. In the same way, this case would present the opportunity to expose the truth about the unborn child, the innocent victims of the horror called abortion, whose silent screams are heard in the deep recesses of the conscience not only of thousands who have assisted in the procedure, but in the minds of all conscientious Americans.

Furthermore, as noted above, President Obama and the Democrat-controlled Congress have announced an aggressively pro-abortion agenda for the next four years, and maybe eight. Justice Ginsburg has recently stated that there will be another vacancy on the High Court very soon. Any expectation that President Obama would appoint a pro-life Justice is naïve, to say the least. Therefore, it would appear that the best chance for presenting a case that could end abortion is now, not later, especially in light of Justice Kennedy's most recent position in the partial birth abortion case of *Gonzales v. Carhart*.<sup>27</sup>

Another reason why the Personhood Amendment may be strategically situated for a reconsideration of *Roe* is the inclination of some conservative Justices to return the issue of abortion to the states, where it arguably belongs under our federalist system. Justices Scalia and Thomas have been the most outspoken champions of this position, but the newcomers on the Court, Chief Justice Roberts and Justice Alito (both devout Roman Catholics), may be more likely to favor this result as well, given their apparent dislike for

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<sup>26</sup> See, e.g., *McGarvey v. Magee-Womens Hospital*, 340 F.Supp. 751, 753 -754 (W.D.Pa. 1972) (the question whether to "afford fetal life constitutional protection" is "a problem for the legislatures of the various states. They must decide the problems in the light of the moral issues, the conflicting rights of the mother and child, the extent of medical knowledge and the interests of the state.") (cited with approval in *Roe v. Wade*); *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 200, 286 N.E.2d 887, 888-889, 335 N.Y.S.2d 390, 392 - 394 (N.Y. 1972) ("whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life . . . is a policy question which in most instances devolves on the Legislature.") (cited with approval in *Roe v. Wade*).

<sup>27</sup> 550 U.S. \_\_\_, 127 S. Ct. 1610 (2007). Justice Kennedy authored the majority opinion upholding the ban on partial birth abortions. In addition, in the case of *Carhart v. Stenberg*, 530 U.S. 914 (2000), Justice Kennedy expressed strong disagreement with his centrist colleagues from the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), signaling a more pro-life position in his abortion jurisprudence.

extremist positions. Again, however, it must be emphasized that predicting the ultimate outcome of a case that has not even been filed is an inherently speculative undertaking.

Finally, the general rule (outside the “abortion distortion” zone) is that states are free to enact laws and constitutional protections more expansive than their federal counterparts.<sup>28</sup> Here, it may be argued here that Mississippi has simply enacted more expansive due process rights for “persons” by means of the Amendment, and therefore it, too, should be permitted under the federal law.

### **Conclusion**

When confronting a moral evil, waiting should not be an option. It is a legal maxim that justice delayed is justice denied. In the case of abortion, a moral evil of almost incomprehensible magnitude, justice has been denied untold millions of innocent children while pro-life leaders wring their hands and tell us to wait. The Mississippi Personhood Amendment is a principled and constitutionally defensible response to the onslaught of abortion on demand. It is, moreover, an attempt to restore the most basic human right for which our founders pledged their lives, their fortunes, and their sacred honor. We pledge our resources and efforts to defend the constitutionality of the Amendment, free of charge, wherever and whenever it is challenged.

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28 *E.g.*, *Cooper v. California*, 386 U.S. 58, 62 (1967) (state free to provide greater protections in search and seizure arena); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (state free to provide greater protection for free speech rights exercised on private property).