

Memorandum

To: All Concerned Pro-Life Supporters
From: Robert J. Muisse, Esq., Thomas More Law Center
Date: September 24, 2007

Re: Response to Bopp & Coleson Memo of August 7, 2007 re: Pro-life Strategy Issues

This memorandum responds to the issues raised in the James Bopp, Jr. and Richard E. Coleson memorandum of August 7, 2007 (hereinafter “Bopp Memo”), and demonstrates why the pro-life movement must press for a human life amendment as its first priority.

Fight to Win

Unfortunately, the Bopp Memo makes plain the unwillingness of the national pro-life leadership to support a human life amendment. While the authors criticize such a strategy, seeking to buttress their arguments by citing to numerous “scholarly articles” that they wrote and making exaggerated claims couched in legal terms, the authors’ position can be summed up as follows: “They fear losing at the risk of winning.”

The Bopp Memo argues for the continuation of an “incremental” approach with no plan in the foreseeable future for ending abortion in this country. Contrary to the position staked out in the memo, after 34 years of abortion on demand through all nine months of pregnancy, it is time to rethink pro-life strategy.

While seeking to decrease the number of abortions performed in this country is a laudable endeavor and should continue, we must never forget that ending all abortions is the ultimate goal. Protecting innocent human life is not negotiable. Accordingly, we should not corrupt our discourse by even suggesting that it is. The fundamental human right is the right to life itself. This is true of life from its earliest stage of development until natural death. Abortion, consequently, cannot be a human right—it is the very opposite.

Protecting innocent human life from its very beginning is a pro-life imperative—there are no exceptions. And while the Bopp Memo makes it seem as if regulating abortion and seeking to end abortion are an “either or” proposition, this is a false dichotomy.¹ There is no conflict

¹ The Bopp Memo contends, “Those pro-lifers who eschew such incremental efforts in favor of doing nothing at all short of measures that would fully reverse *Roe* and provide full recognition of the unborn as persons, do so on the theory that anything less somehow recognizes abortion as legitimate, which supposedly reduces the chance of reversal of *Roe*. Beside being in error on both counts, they spend most of their time attacking other pro-lifers with differing views on strategy.” The authors of the memo do not identify who the “they” are that “spend most of their

between the two positions. They both can and must coexist. It would be a tragic mistake to be content with a strategy that makes ending abortion secondary to other regulatory efforts, or worse yet, a strategy that avoids it altogether. Accordingly, the Georgia Human Life Amendment should be the pro-life movements' main effort.

The Georgia Human Life Amendment presents not only an opportunity to challenge the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), it provides a historic opportunity to educate the general public regarding the harm caused by all abortions, not just late-term, partial-birth abortions, which, in comparison, are far fewer in number. Accordingly, the proposed amendment provides the pro-life movement with the opportunity to demonstrate the humanity of the unborn victim at the earliest moments of life and the inhumane way in which this life is destroyed by abortion. Demonstrating the humanity of the victim is a key component in social reform. Throughout the history of our nation, social reform has always been achieved through such efforts, which dramatize the injustice and prick the collective conscience of the culture. Examples of this phenomenon include the abolition of child labor, the civil rights movement, anti-war movements, and environmental causes.

A criticism of the human life amendment approach is that the American public is not ready to accept the reality that human life begins at fertilization. If this criticism is valid, then it is a serious indictment of the national pro-life movement and calls into question its efficacy over the years. The Georgia Human Life Amendment provides an opportunity to remedy this grave deficiency, which alone is reason enough to support the amendment.

In the final analysis, we are in this fight to win, not to go on in perpetuity, content with an occasional “honorable mention.” To succeed in this fight, we must have leaders who are committed to winning it.

What does it mean to win the pro-life fight? John Paul II defined the objective in the *Gospel of Life*,

The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life.

Evangelium Vitae at ¶ 60.

The Georgia Human Life Amendment seeks to achieve this objective—and nothing less.²

time attacking other pro-lifers with differing views”; nonetheless, the authors spare little effort attacking pro-lifers who differ with *their* views.

² The Georgia Human Life Amendment uses the term “fertilization” in place of “conception.” “Conception,” at one time, was commonly understood as the union of the sperm and the ovum. Another word for this event is “fertilization.” However, the meaning of “conception” was changed in recent years to refer not to the fertilization of the ovum by the sperm—the moment

The Bigger Picture

As the Bopp Memo acknowledges, *Roe v. Wade* “was widely-decried by legal scholars as being without constitutional warrant.” However, it cannot be gainsaid that the central holding of *Roe v. Wade* remains the primary obstacle to any meaningful pro-life initiative that seeks to end abortion.

To remove this obstacle, a case must be presented to the United States Supreme Court that challenges the central premise of *Roe*—that the unborn is not a person within the meaning of the law. In *Roe*, the Court conceded that if the “personhood” of the fetus “is established, [the case for abortion], of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.” *Roe*, 410 U.S. at 156-57. The Court reviewed the language of the United States Constitution and concluded that the word “person” did not have any prenatal application. *Id.* The Georgia Human Life Amendment seeks to establish “personhood” as a *state* constitutional right.

In the early years of the pro-life movement, there was national support for a *federal* human life amendment—a proposal that would amend the United States Constitution. Some “scholars” saw such a proposal as a legitimate means for seeking reversal of the *Roe* decision, as the Bopp Memo notes. Some of this history is briefly set forth in the memo, which concludes by bemoaning the fact that “[d]espite valiant efforts in the 1980s, attempts to reverse *Roe* by a federal constitutional amendment or statute failed,” and stating parenthetically, “prospects for doing so now or in the near future are nonexistent in light of current political realities.”³ (emphasis added).

On this point, the Bopp Memo is grossly misleading. The authors appear to conflate the NRLC’s attempts to pass a *federal* constitutional amendment with Georgia’s attempts to pass a *state* constitutional amendment. With regard to “political realities,” the two are incomparable. The current *political* reality is that an amendment to the Georgia Constitution has a very good chance of succeeding. The mistake of the Bopp Memo is to equate the national political situation in the United States Congress with the local political situation in Georgia.

when life begins—but instead to the implantation of the blastocyst (the newly developing human at about a week after fertilization) into the wall of the mother’s uterus. Thus, fertilization is a more precise term for when human life truly begins.

³ Here, the Bopp Memo raises an important question for national leaders in the pro-life movement: *why are the “political realities” so bad for the pro-life movement that the prospects for getting a federal constitutional amendment are now “nonexistent”?* Getting pro-life politicians elected is one of the main objectives of the national pro-life movement—an objective to which much time, effort, and substantial financial resources have been committed. Has that objective failed so miserably that national pro-life leaders now concede that political support for a national effort to end abortion is “nonexistent”? This is the elephant in the room that national pro-life leaders ignore (or worse yet, promote by making the abortion issue negotiable so that “incremental” gains—Pyrrhic victories in reality—can be achieved).

The Bopp Memo proceeds to note that in addition to efforts to amend the federal constitution, the national pro-life movement was “focused on altering the balance of Supreme Court justices supporting *Roe*.” Here, the authors note the dashed hopes of the pro-life community by the vote of Justice Kennedy in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Justice Kennedy, after all, was endorsed by the National Right to Life Committee. In fact, it seems that many Republican nominees to the Supreme Court (i.e., Justices Kennedy, O’Connor, Souter, *et al.*) have dashed the hopes of the pro-life faithful, calling into question the national pro-life movement’s influence in this regard as well.

What is most interesting about the *Casey* decision, which the Bopp Memo does not mention, is that Justice Kennedy had an 11th hour change of heart, voting in favor of upholding *Roe*. Only three years earlier, Justice Kennedy had put himself on record within the Court as calling for *Roe* to be overruled. Despite Justice Kennedy’s previously stated views, Justices O’Connor and Souter persuaded Justice Kennedy to change his position so as to forge a centrist coalition to reach a compromise on *Roe*—one that reaffirmed its basic holding, but also permitted greater state regulation. However, based on his dissent in *Carhart v. Stenberg*, 530 U.S. 914 (2000), one could surmise that Justice Kennedy felt betrayed by his persuasive colleagues. And perhaps it was no accident that Justice Kennedy was selected by Chief Justice Roberts to write the majority opinion in *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007). Despite what some might say about Justice Kennedy—including former law clerks in closed-door meetings—there is hope that Justice Kennedy will be persuaded to do the right thing when the opportunity presents itself once again.

The Bopp Memo states, “As it currently stands, it *seems* that Justices Scalia and Thomas would vote to reverse *Roe*, and there is a *possibility* that Chief Justice Roberts and Justice Alito might ultimately do so as well, although these two votes remain *speculation*.” (emphasis added). The memo further states, “And it should be noted that even anti-*Roe* Justice Scalia apparently believes that the Constitution requires return of abortion regulation to the states, not that it requires protection of the unborn as ‘persons’ (absent a federal constitutional amendment making them so, of course).”

As an initial matter, based on the current makeup of the Court it is *most* likely that if the Court were to reverse *Roe* it would do so by returning the issue to the states. Both Justices Scalia and Thomas have stated that the Court’s abortion jurisprudence has no basis in the Constitution. Thus, in many respects, the *best* case to present to the Court is one in which a state is seeking to protect human life as a matter of *state* constitutional law. For a state to amend its constitution to protect life speaks volumes to the Court. And it is perhaps the best case scenario to tip the balance of the scale with Justice Kennedy. Justice Kennedy was persuaded by Justices O’Connor and Souter in the *Casey* decision; there is good reason to believe (and to pray) that Chief Justice Roberts and fellow Justices Alito, Scalia, and Thomas (all fellow Catholics) could influence Kennedy in a similar fashion. It is certainly worth the effort to try. Indeed, given the political landscape (and the political realities that the Bopp Memo concedes), we may have to wait another generation to have as good a chance as we have at the moment.

Regarding the current makeup of the Court, consider the following excerpt from a speech given by Senator Brownback at this year’s National Right to Life Convention:

“We must continue to work to overturn *Roe v. Wade*. *Roe v. Wade* was wrongly decided and must be overturned. We must reign in the out-of-control judiciary in order to once again be a people of life. *Roe* is an abomination and must be overturned. We are, I believe, one vote away from overturning *Roe v. Wade*. I want to be the President who appoints the justice who votes to overturn this decision. . . . I was proud to lead the fight for strict constructionists like John Roberts and Samuel Alito now on the Court.”

Thus, it appears that Senator Brownback, who was intimately involved in getting Chief Justice Roberts and Justice Alito on the bench, is rather confident that they would vote in favor of overturning *Roe*—*if given the chance*. And there is little doubt as to how Justices Scalia and Thomas would vote—*if given the chance*. The all important fifth and deciding vote will likely be up to Justice Kennedy. As noted above, it is worth taking the chance now rather than waiting another 34 or more years when the makeup of the Court could potentially be far worse given the “political realities.” Moreover, as it stands now, it will take several years to get a case to the Court. With the ages and questionable health of some of the justices, it is impossible to predict with certainty the Court’s makeup 3 years from now, let alone 30 years from now. At the end of the day, this “prediction game” can go on in perpetuity with the naysayers and critics always finding a reason to argue “now is not the time.”⁴ Nevertheless, “now is the time” to start educating the public about the horrors of all abortions and the Georgia Human Life Amendment—like the bans on partial-birth abortion—provides the ideal vehicle to do so.

The crux of the Bopp Memo’s criticism of the Georgia Human Life Amendment is found on page 3. The authors confidently make the following claims (actually predictions) with *absolute* certainty: (1) the amendment will be struck down by a federal district court, (2) that decision will be affirmed on appeal, (3) the Supreme Court will not grant review of the decision, and (4) legal fees will be paid to the pro-abortion attorneys who brought the case. The authors—assuring their readers that the proponents of the Georgian Human Life Amendment are simply engaged in “stirring rhetoric” to convince people to support the proposal—proceed to use “stirring rhetoric” to proclaim that “the effort [to pass such an amendment] will have *enriched* the pro-abortion forces for *no gain* for the pro-life side,” noting “the *hard fact* that such an effort

⁴ Interestingly, despite the defeat in *Carhart v. Stenberg*, which struck down Nebraska’s ban on partial-birth abortion, the national pro-life leadership was willing to take another shot at banning this controversial procedure under federal law—at great risk and cost. In fact, once this law was passed, it was uniformly—and predictably—struck down by lower federal courts across the country based on prior precedent. Nevertheless, the Supreme Court, in a 5 to 4 decision, upheld the ban against a facial challenge in *Gonzales v. Carhart*. In her dissent, Justice Ginsberg observed, “Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman’s health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.” *Gonzales*, 127 S. Ct. at 1614 (Ginsberg, J., dissenting). Thus, it is evident that the Court was willing to “retreat” from *recent* precedent to find a way to uphold a ban against this abortion procedure. There was certainly no guarantee of this outcome.

is presently *doomed to expensive failure*.”⁵ (emphasis added). Despite the authors’ best efforts, no one can predict the future with such clarity. Moreover, the authors fail to mention the tremendous gains for the pro-life side by making the issue of early term abortions—and the humanity of the unborn—the subject of public debate and discussion.

Not content with predicting the future, the authors of the Bopp Memo seek to frighten proponents of the human life amendment away by disingenuously claiming that if the Supreme Court did accept a case challenging the human life amendment, not only would the Court reaffirm the abortion right, it would go a step *further* and abandon its “substantive due process” analysis and affirm the abortion right under an “equal protection” analysis—both of which are grounded in the Fourteenth Amendment. The authors cite the dissent in *Gonzales* as proof positive. According to the authors this “horror of horrors” “would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize *all* current laws on abortion.”⁶ (emphasis added). The authors appear to justify their remarkable position by claiming that “[a] law prohibiting abortion would force Justice Kennedy to vote to strike down the law, giving Justice Ginsberg the opportunity to rewrite the justification for the right to abortion for the Court.”⁷

The errors of the authors’ position are many—and sometimes quite glaring. For example, as the authors admit at the beginning of their memo, the abortion right, as presently

⁵ The authors repeat their “stirring rhetoric” later in the memo as well: “[S]o long as the declared constitutional right to abortion enjoys majority support on the Supreme Court, as it does now, any state effort to challenge *Roe* will be expeditiously struck down, that decision will be affirmed on appeal, the Supreme Court will not review the case, and the state will have to enrich the pro-abortionists with hundreds of thousands of dollars in court-awarded legal fees and costs.”

⁶ The authors’ “sky is falling” argument is repeated later in the memo: “[I]f the Court does accept review of the case, the likelihood is *great damage* to the pro-life cause through the adoption of a new ‘equal protection’ theory justifying the right to abortion, *which would then be used to attack all current regulations on abortion, even those already approved by the courts*. The timing of such an effort is clearly *premature*, and it could have a very *destructive result* given the current makeup of the Supreme Court.” (emphasis added). The memo concludes, “Losing is not cost-free, as the proponents of this approach suggest [note: no one has ever suggested such a thing]. The Court (if it does review the case) is likely to switch to a more absolutist equal protection rationale for the abortion right, and all current regulations on abortion would be subject to, and likely struck down under, this new rationale. This would have a devastating effect on current protections for the unborn.” In light of such hyperbole, it is unconscionable that the authors of the memo would accuse the supporters of the Georgia Human Life Amendment of engaging in “stirring rhetoric.”

⁷ While attempting to make their argument, the authors make a rather telling admission, “This [i.e., the threat to make new law that would strike down all current laws regulating abortion] is highly unlikely in a case that decides the constitutionality of such things as PBA, parental involvement laws, women’s right-to-know laws, waiting periods, and other legislative acts that *do not prohibit abortion in any way*, since Justice Kennedy is likely to approve such laws.” (emphasis added).

construed, is “virtually absolute.” Thus, there is no basis for claiming that this “virtually absolute” right will gain further strength under an equal protection analysis than it currently enjoys under a substantive due process analysis—how could it? Indeed, it has taken years to get the Court to uphold a law that prohibits infanticide (i.e., partial-birth abortion) against a facial challenge—without any guarantee that it would stand against an as applied challenge. The equal protection analysis may be more appealing to legal scholars (since, as the Bopp Memo rightfully notes, *Roe* “was widely-decried by legal scholars as being without constitutional warrant”—“legal scholars” on both sides of the issue, including Ruth Bader Ginsberg), but it won’t change its status as a constitutional right nor would it invoke a sea change in the law, as the authors predict.⁸ Regardless of how it is created, the abortion right is found nowhere in the Constitution and is therefore susceptible to future challenges before a Court of strict constructionists.

Second, under an equal protection analysis that is based on “gender discrimination,” as opposed to laws that discriminate on the basis of fundamental rights, the Court currently applies an intermediate level of scrutiny as opposed to strict scrutiny.⁹ Thus, changing from a

⁸ The Bopp memo cites two state cases to support the authors’ bold proposition. The authors’ reliance on these cases is misplaced. As an initial matter, other states have reached contrary conclusions. For example, in *Doe v. Department of Soc. Serv.*, 439 Mich. 650 (1992), the Michigan Supreme Court held that Michigan’s statute prohibiting the use of public funds to pay for abortion unless the abortion was necessary to save the mother’s life did not violate the equal protection clause of Michigan’s Constitution. See also *Rosie J. v. North Carolina Dep’t of Human Res.*, 347 N.C. 247 (1997) (holding that the state’s policy of funding childbirth expenses, but not the costs of medically necessary abortions, for indigent women did not violate equal protection). More fundamentally, in both *Harris v. McRae*, 448 U.S. 297 (1980) and *Maher v. Doe*, 432 U.S. 464 (1977), the Supreme Court held that the U.S. Constitution, including the Equal Protection Clause, provides no obligation for the government to pay for abortions even though abortion is a constitutionally protected right. This line of reasoning applies not only to abortion, but to other constitutional rights as well.

⁹ For example, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that a state disability insurance program provision excluding benefits for disability resulting from normal pregnancy did not discriminate on the basis of sex in violation of the Equal Protection Clause. “While it is true,” the Court stated, “that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.” *Id.* at 496, n. 20. In *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Court held that California’s statutory rape law did not unlawfully discriminate on the basis of gender. The Court stated, “[B]ecause the Equal Protection Clause does not ‘demand that a statute necessarily apply equally to all persons’ or require ‘things which are different in fact . . . to be treated in law as though they were the same,’ a statute will be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” *Michael M.*, 450 U.S. at 469 (citations to quotations omitted). More fundamentally, in the abortion context the U.S. Supreme Court “establish[ed] conclusively that it is not ipso facto sex discrimination” for a law to disfavor abortion. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273 (1993) (citing *Maher v. Roe*, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980)). In *Bray*, the Court held that for purposes of a claim brought under

substantive due process analysis to an equal protection analysis based on the fact that laws prohibiting abortion affect women and not men could arguably weaken the abortion right.

Finally, it is a fundamental principle of law that when there is no clear majority opinion in the Court, the holding of the Court is based on the narrowest grounds for the decision. Therefore, based on the current makeup of the Court, if a case were presented challenging the proposed amendment and if Justice Kennedy did vote to strike down the proposal, it is most likely that he would do so based on current precedent and not on some new “super abortion right” created by Justice Ginsburg. Thus, assuming an adverse outcome for argument sake, it is far more likely that Justice Kennedy would write a “moderate” concurring opinion—which would represent the holding of the Court—than it is for him to join Justice Ginsburg’s opinion.¹⁰ It borders on the ridiculous to take a position that Justice Kennedy—a National Right to Life Committee endorsed judicial nominee who opposed abortion but changed his vote only at the 11th hour in *Casey* in order to forge a “moderate” coalition, who dissented in *Carhart v. Stenberg*, and who wrote the majority opinion in *Gonzales*—would suddenly transmogrify into an abortion-loving crony of Justice Ginsburg. Indeed, it is *far* more likely that Justice Kennedy would follow the Chief Justice and Justices Scalia, Thomas, and Alito—his closer companions—and uphold the proposed amendment, reversing *Roe*.

Keeping Abortion Alive?

The authors of the Bopp Memo make a rather disturbing analogy between prohibition and abortion, claiming that “wise leaders recognized from the beginning that one of their foremost tasks was to *keep abortion alive* as an issue,” claiming, in comparison, that the adoption of the Eighteenth Amendment resulted in prohibition becoming a “dead issue.” (emphasis added). The authors surmise that if anyone today tried to reenact a constitutional ban on alcohol consumption, “[n]o one would read his literature, attend his ‘rallies,’ or donate to the cause”—implying the same fate for supporters of a successful abortion ban.

The obvious problem with keeping abortion alive as an issue (i.e., not seeking to end it like the Eighteenth Amendment ended alcohol consumption for the time being), is that keeping

42 U.S.C. § 1985(3), opposition to abortion does not reflect an animus against women. As the Court noted, “[I]t cannot be denied that there are common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class” *Bray*, 506 U.S. at 270.

¹⁰ In fact, it appears that not even Justice Ginsberg would take the extreme position that the authors of the Bopp Memo attribute to her. In the law review article cited by the authors, Justice Ginsberg had this to say about the abortion funding cases: “If the Court had acknowledged a woman’s equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority *perhaps might have seen* the public assistance cases as instances in which, borrowing a phrase from Justice Stevens, the sovereign had violated its ‘duty to govern impartially.’” Ruther Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. Rev. 375, 385 (1985) (emphasis added). This is hardly a definitive statement on what the law *must be* under an equal protection analysis.

abortion alive means killing the unborn. Each day abortion remains an issue—and the law of the land—is a day in which innocent life is destroyed.

Despite the self-congratulatory nature of the Bopp Memo, abortion is alive today as a pro-life issue not because of the doings of some “wise leaders” in the national pro-life movement. In fact, when the Supreme Court decided *Roe v. Wade* in 1973, establishing abortion as a “virtually absolute” right, the issue did not go away—as the Bopp Memo’s theory would predict. Indeed, there is no greater social issue that tears at the soul of America today than abortion. And the reason for that is simple: *abortion is intrinsically evil*. No Supreme Court pronouncement nor constitutional amendment creating an abortion right in the future will ever change that fact. The same cannot be said of alcohol consumption or any number of social issues prevalent today. The closest issue is slavery, which took a civil war and a constitutional amendment to resolve.¹¹

Partial Victory?

The Bopp Memo lauds the national pro-life movements’ ability to “frame the debate to their advantage” and “change the hearts and minds of the public on abortion,” citing the recent debate over partial-birth abortion as the crowning achievement. Upon reflection, this claim provides no basis for opposing the Georgia Human Life Amendment. Moreover, if prohibiting a rare and seldom used procedure by means of a ban that will not save one life is the great success of framing the abortion debate, then the pro-life movement has settled for failure. Furthermore, if that success means that we cannot push for meaningful regulation, as the Bopp Memo suggests, then grave mistakes have been made along the way by the self-anointed leaders of the movement.

As an initial matter, it is only fair to note that the Thomas More Law Center has supported and will continue to support efforts to ban the grisly partial-birth abortion procedure, as well as other efforts to reduce the number of abortions, including protecting pro-life demonstrators’ First Amendment rights, which allow the public debate to continue uninhibited.

¹¹ The authors of the Bopp Memo cite to “[t]he lessons of history, such as Wilberforce’s efforts to end slavery” as justification for an “incremental” approach. But history teaches otherwise. In fact, Wilberforce repented of his incremental approach, and then went about the business of winning total emancipation. And the words penned by Martin Luther King, Jr. in his *Letter from Birmingham Jail* ring true today:

“We know through painful experience that freedom is never voluntarily given by the oppressor, it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was ‘well timed’ in view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word ‘wait’! It rings in the ear of every Negro with piercing familiarity. This ‘Wait’ has almost always meant ‘Never.’ We must come to see, with one of our distinguished jurists, that ‘justice too long delayed is justice denied.’”

Unfortunately, the longer we “wait” the more engrained abortion will become in our Nation’s social fabric.

With regard to the partial-birth abortion issue, the Law Center filed briefs in the U.S. Supreme Court in support of the Nebraska and the federal bans. And we recently filed a petition for a writ of certiorari in the Supreme Court, asking the high court to review a case in which the Law Center is representing the organization responsible for enacting the citizen-initiated Legal Birth Definition Act—Michigan’s unique attempt at banning the controversial procedure. The Michigan law was struck down by a federal district judge in Michigan and that decision was affirmed by the U.S. Court of Appeals for the Sixth Circuit.

With the risk of being castigated as “shameless” and “unjust” by the authors of the Bopp Memo for criticizing the recent partial-birth abortion “victory,” consider the following. The authors of the Bopp Memo note the importance of choosing the proper terrain when engaging in a fight. While terrain is important, victory is not secured by simply holding terrain—it is secured by defeating the enemy.¹² Indeed, one could argue that the supporters of abortion succeeded in focusing the abortion debate on a relatively rare, late-term abortion procedure, leaving untouched the ground where the battle truly takes place—early term abortions. The simple scraping of cell tissue that occurs during early term abortions is relatively harmless (their argument) when compared with the grisly but rare procedure that results in the death of a late-term fetus—a procedure that is only used in extreme situations (their argument as well). The abortion debate over the past decade has thus focused not on the “terrain” where over 90% of all abortions are performed—the “key terrain”—but on the “terrain” that will not prevent the killing of one unborn child—the physician will simply employ a different procedure to do his killing inside the womb.¹³ Indeed, the *Gonzales* decision, while important, simply upheld the federal ban against a facial challenge and left open the possibility that the broad “health” exception that dooms all abortion restrictions would be employed in an as applied challenge, thereby potentially negating the ban altogether.

¹² The authors of the Bopp Memo contend that “the pro-life movement must at present avoid fighting on the more difficult terrain of its own position, namely arguing that abortion should not be available in cases of rape, incest” As stated previously, such a position makes abortion negotiable and is a grave mistake. Georgia is a case in point. In Georgia, the pro-life leadership rejected the argument advanced in the Bopp Memo approximately 8 years ago, and the results were nothing short of miraculous. Indeed, it was not *until* the Georgia Right to Life changed its standard of endorsement for political candidates to only those who condemn abortion, with no “rape and incest” exception, did it see any substantive pro-life advances. When Georgia Right to Life took the moral and principled high ground on the issue, the state went from approximately 2% pro-life legislators in the Senate to approximately 53%, and from approximately 3% pro-life legislatures in the House of Representatives to approximately 43% (52% if one counts those that claim to be pro-life). And the state elected a pro-life Governor and Lieutenant Governor. All of these pro-life political candidates reject the “rape and incest” exception as an acceptable alternative. For more information about this remarkable turnaround in Georgia, see the article at http://worldnetdaily.com/news/article.asp?ARTICLE_ID=55294.

¹³ *Gonzales*, 127 S. Ct. at 1647 (Ginsberg, J., dissenting) (claiming that the ban does not further the Government’s legitimate interest in protecting life by noting that “[t]he law saves not a single fetus from destruction, for it targets only a *method* of performing abortion.”).

The partial-birth abortion debate has also had the deleterious effect of providing political coverage for politicians who are not truly pro-life. It is easy to support the ban on partial-birth abortion, as evidenced by the support of the likes of New York Senator Moynihan. Who will support efforts to end abortion altogether? The incremental approach has had the effect of making the abortion issue negotiable, as evidenced by the “political realities” identified previously. The more negotiable it becomes, the less likely it will end.

Finally, consider the incredible amount of time, money, and effort that went into supporting the various bans on partial-birth abortion. Such scarce resources should be used to educate the public about the humanity of the unborn child and the horrors of early term abortions in order to change public opinion in a way that will end all abortions.

Unfortunately, the Bopp Memo makes plain that leaders in the national pro-life movement have no interest in supporting the Georgia Human Life Amendment and, in fact, appear intent on defeating it—an early term political abortion, if you will—thereby seeking to fulfill their prophesy that the proposed amendment will have no chance. But the leaders of the national pro-life movement lead at the pleasure of those who support them. There is an ever increasing number of supporters who are dissatisfied with the “incremental approach only” strategy and the apparent lack of resolve to end abortion. Ending abortion is not some fanciful idea—it is a moral objective that must be pursued. Supporting the Georgia Human Life Amendment is the right thing to do.

Georgia Human Life Amendment

As noted in the Bopp Memo, there is an effort to pass a human life amendment in Georgia. The proposed language of the amendment is as follows:

Paramount right to life. (a) The rights of every person shall be recognized, among which in the first place is the inviolable right of every innocent human being to life. The right to life is the paramount and most fundamental right of a person.

(b) With respect to the fundamental and inalienable rights of all persons guaranteed in this Constitution, the word “person” applies to all human beings, irrespective of age, race, sex, health, function, or condition of dependency, including unborn children at every state of their biological development, including fertilization.

This proposal achieves two fundamental purposes that are essential to the pro-life movement. First, it establishes and affirms, without question, that Georgia is a “pro-life” state that protects all human life from the moment of fertilization as a matter of constitutional law.¹⁴

¹⁴ Even if left unchallenged, the proposed amendment will ensure that Georgia is counted among the “pro-life” states in this Nation. As noted previously, upon the reversal of *Roe*, it is most likely that the abortion issue will return to the states, as even abortion supporters acknowledge. When that happens, the proposed amendment puts Georgia in a very strong pro-life position.

And second, it provides a direct challenge to the central holding of *Roe v. Wade*, 410 U.S. 113 (1973).

It is important to bear in mind that the proposal establishes a constitutional principle; it does not enact criminal or civil legislation. And it establishes a constitutional principle that provides a direct challenge to the fundamental holding of *Roe v. Wade*. Without a direct challenge to *Roe*, any proposal to protect innocent human life from abortion is meaningless.

The proposed amendment explicitly affirms, as a matter of state law, that “personhood” attaches at the moment of fertilization. It is a well-established principle of law that States possess the right to adopt their own constitutions with rights *more* expansive than those conferred by the federal constitution. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (affirming “the authority of the State to exercise its police power [and] its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”).

While some of the language of the Georgia Human Life Amendment is similar to the NRLC 1981 amendment, the Bopp Memo criticizes the Georgia proposal for not including the last two sections of the NRLC proposal. In fact, the authors claim that “[w]hile the NRLC Amendment, if enacted as a constitutional amendment, would have successfully restored legal protection to unborn children, the proposed Georgia Human Life Amendment will not.” The authors are once again mistaken.

The last two sections of the NRLC proposal, which are not included in the Georgia proposal, are unnecessary. Constitutional amendments are commands that limit the power of government. The Bill of Rights in the U.S. Constitution, for example, restricts the government from enacting laws that abridge certain fundamental liberty interests. The Fourteenth Amendment, which includes the Equal Protection Clause, also prohibits the government from carving out exceptions for a certain class of persons or from abridging any fundamental right. As noted previously, the U.S. Supreme Court acknowledged in *Roe* that if the “personhood” of the fetus is established, the abortion right “collapses” for the fetus’ right to life would be guaranteed by the Fourteenth Amendment. *Roe*, 410 U.S. at 156-57. The same holds true here. If enacted, the Georgia Human Life Amendment will successfully restore legal protection to unborn children by guaranteeing a fetus’ right to life from the moment of fertilization as a matter of state constitutional law.¹⁵ The state would be prohibited from passing laws that would permit the

¹⁵ As another scare tactic, the Bopp Memo also raises the specter of “repeal by implication,” arguing that since the personhood amendment is a prohibition on abortion (in contradiction to what the authors said previously), it would repeal all existing abortion regulations “[s]o when the inevitable striking down of the prohibition occurs, the state will have to reenact the currently permissible regulations of abortion,” causing “significant damage . . . to the legal protection for the unborn in that state.” According to this logic, no effort to ban abortion should ever be attempted. However, to effect repeals by implication, the inconsistency between the existing statute and the new constitutional provision must be irreconcilable. In fact, existing statutory provisions are often interpreted so that they agree with the constitutional provision. *See, e.g., People v. Bricker*, 389 Mich. 524 (1973) (interpreting Michigan’s abortion statute to be

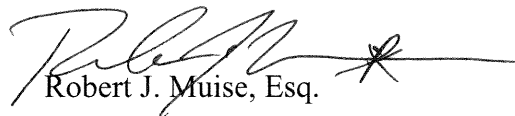
intentional killing of the unborn, and the state would be prohibited from denying the unborn the equal protection of the law (i.e., the state could not carve out exceptions for the unborn from its criminal or civil laws). No further legislation would be necessary to protect the unborn.¹⁶

Final Analysis

The pro-life movement must rethink its strategy to include efforts to end abortion. One such effort is the Georgia Human Life Amendment. The status quo is unacceptable. If succeeding in reversing *Roe v. Wade* and ending the slaughter of millions of innocent lives each year means that “no one would read [NRLC] literature, attend [its] ‘rallies,’ or donate to the cause,” then that is the price of victory we should be willing to pay.

Sincerely,

THOMAS MORE LAW CENTER



Robert J. Muise, Esq.

consistent with *Roe v. Wade* and *Doe v. Bolton*). Indeed, as the courts uniformly acknowledge, repeal by implication is disfavored. Moreover, there is nothing preventing the legislature from reenacting any statute that might be considered repealed by the amendment.

¹⁶ It should be noted that if the state legislature wanted to immunize a woman from criminal prosecution for participating in an abortion, then that would be the prerogative of the legislature. Such a proposal should not conflict with the fundamental principles of law described above.