Forecast Foundation

Newsletter

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For over twenty years, I have urged various leaders in the pro-life movement to develop a state by state strategy to restore the anti-abortion laws so as to protect all human life from the time of conception. After all, under the United States Constitution, state governments, not the federal government, have the constitutional authority to protect human life.

Since Roe v. Wade, however, the pro-life movement has focused on the U.S. Congress, urging them to propose a human life amendment to the Constitution or to enact legislation protecting the lives of the preborn. In the meantime, most pro-life leaders have insisted that, unless the President appointed pro-life justices to the United States Supreme Court which, in turn, overruled Roe v. Wade, there was really nothing that any state legislature could do.

For these twenty-plus years, I have maintained that is not true. So, in April of this year, when I got a call from Steve Lefemine of Columbia Christians for Life asking me for help on the "Right to Life Act of South Carolina," a first step to restore South Carolina's pre-Roe v. Wade anti-abortion laws, I was most pleased to do so. Working creatively and diligently, Steve arranged for me to testify by telephone, in addition to submitting the following written statement:

In the House of Representatives of the State of South Carolina
Before the Subcommittee on Constitutional Law of the House Judiciary Committee
Judiciary Committee Hearing Room 516, South Carolina State House Complex
April 25, 2001

H. 3252
"Right to Life Act of South Carolina"

STATEMENT
OF HERBERT W. TITUS

My name is Herbert W. Titus. I am an attorney, licensed to practice before the Supreme Courts of the Commonwealth of Virginia and of the United States of America. I am associated in the practice of law with Troy A. Titus, P.C. of Virginia Beach, Virginia and serve of counsel to the firm of William J. Olson, P.C. of Mc Lean, Virginia. In my law practice I specialize in constitutional law and strategy, having taught constitutional law for nearly thirty years at five different American Bar Association accredited law schools.

I am appearing this day before the Judiciary Committee of the House of Representatives for the State of South Carolina to testify in favor of the constitutionality of H. 3252, the "Right to Life Act of South Carolina." I am grateful to the Constitutional Laws Subcommittee, and its

Chairman, for the opportunity to file this written statement, as well as for the special effort to enable me to provide oral testimony by long distance telephone.

Since the United States Supreme Court decided *Roe v. Wade,* 410 U.S. 113 (1973), the South Carolina legislature, after conforming its anti-abortion laws to the trimester formula set forth in that opinion, has responded with legislation designed to limit the power of a woman to terminate a pregnancy. Following the lead of other state legislatures, the South Carolina legislature has enacted several such measures, including the Parental Consent Act, the Woman's Right to Know Act, and a partial-birth abortion statute.

In each case, the legislature has tailored its statutory enactment to meet the constitutional standards set forth in *Roe v. Wade* and its federal progeny. Sometimes it has succeeded, as has been the case with its effort to limit access to abortions. Other times it has failed, as has been the case with its statute prohibiting partial-birth abortion. Whether it has succeeded or failed, the legislature has discovered that its choices concerning this crucial issue of public policy have been largely dictated by federal judicial interpretations of the United States Constitution, not by the people's elected representatives of the State of South Carolina.

The proposed bill would change this, returning the power to protect the lives of South Carolina's posterity to the people's elected representatives, as it was under our federal system prior to *Roe v. Wade.* By recognizing that Article I Section 3 of the State Constitution vests "the right to due process of law...and to equal protection of the laws...at fertilization," H. 3252 provides for more "expansive" state constitutional protection of the lives of "each newly born and preborn human person" than the protection for such life found by the Supreme Court in *Roe v. Wade* under the due process clause of the Fourteenth Amendment.

According to the well-settled judicial rule of the United States Supreme Court and of the Supreme Court of this state, the federal constitution sets only the minimum standards of due process of law. Thus, "state courts may provide more expansive rights under their own constitutions than the rights which are conferred by the United States Constitution." *Anonymous v. State Board of Medical Examiners,* 496 S.E.2d 17, 19 (1998). Pursuant to Article I, Section 8 of the State Constitution, the legislature, likewise as a co-equal branch of state government, may enact a statute, providing for more expansive due process of law rights than afforded by the federal constitution. Id., 496 S.E.2d at 20. ("We...leave it to the General Assembly to...provide the higher standard of proof...if it determines the higher standard appropriate....").

Just because the text of Article I, Section 3 of the South Carolina Constitution is similar, if not almost identical to, the text of the due process and equal protection clauses of the Fourteenth Amendment does not dictate a different rule. As Harvard law professor, Laurence Tribe, has asserted, "state courts interpreting state constitutional provisions need not be bound by Supreme Court interpretations of like-worded federal provisions." L. Tribe, *American Constitutional Law* 41, n. 56 (2d ed. 1988).

The Supreme Court of South Carolina has followed suit, noting that there must be a parallel history of common meaning and practice before a state court will assume that a particular state constitutional provision must be construed to mean the same as its federal counterpart. Even then, there must be good reason for the state constitutional protection to be construed in harmony with the federal one, and not more expansively. *See State v. Easler,* 489 S.E.2d 617, 623 (1997).

A more expansive reading of the state constitution, also, does not violate Article VI of the United States Constitution, which provides that "this Constitution is...the Supreme Law of the land...." As Arthur L. Coleman of the South Carolina Bar has aptly and correctly observed:

> The Supremacy Clause...does not prevent a state from surpassing the minimum limits of the federal Bill of Rights, and providing broader protections for civil liberties in its own constitution. Therefore, the Supreme Court of South Carolina is free to construe the civil liberties guaranteed in the South Carolina Constitution more expansively than the United States Supreme Court has interpreted similar guarantees in the federal Constitution. 19 *SOUTH CAROLINA JURIS.* 27-28 (1993).

This principle holds true even when a state constitutional guarantee grants a higher right to a person that would bring that right into conflict with the right of another recognized under a federal guarantee. For example, in 1972, the United States Supreme Court ruled that the freedom of speech under the First Amendment, as applied to the states via the due process clause of the Fourteenth Amendment, did not guarantee a right of access to engage in speech upon a privately owned shopping center. Thus, the owner of the shopping center was free to permit or exclude speech as he wished without state interference. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

Thereafter, the California Supreme Court found that its **state constitution** guaranteed the right of access denied under the Fourteenth Amendment in the *Lloyd* case. Nevertheless, the United States Supreme Court refused to strike down the California Supreme Court's interpretation of the California free speech guarantee, even though it adversely impacted on the free speech of the privately owned shopping center, as guaranteed by the First and Fourteenth Amendments. *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980).

H. 3252, if enacted, would enable the South Carolina legislature to overcome the barriers to preventing full protection of the lives of preborn human beings. In *Roe v. Wade*, the United States Supreme Court based its holding that a woman had a right to an abortion upon its ruling that an unborn child was only "potential life," not a fully-human life, and therefore, was not a "person" within the meaning of the Fourteenth Amendment due process clause. In contrast to this narrow interpretation of the meaning of "person" in the federal constitution, H. 3252 recognizes that Article I, Section 3 of the state constitution contains a more expansive definition, vesting the due process guarantee of life, liberty and property, and the guarantee of equal protection of the laws, to every human person "at fertilization."

If the right to life and to equal protection vests at fertilization, then a woman's constitutional right to terminate her pregnancy, that would otherwise be recognized by the United States Supreme Court under the due process clause of the Fourteenth Amendment, disappears. As Harvard law professor Tribe has asserted, and as several liberal Supreme Court justices have maintained, "judgments of the Supreme Court limiting the scope of federal constitutional rights," here the right to life of the preborn, may be "overcome" by state officials "by resort to their own constitutions...." L. Tribe, *American Constitutional Law, supra,* at 166, n. 27. *See, e.g., Connecticut v. Johnson,* 460 U.S. 73, 81, n. 9 (opinion of Blackmun, J.); *Oregon v. Kennedy*, 456 U.S. 667, 680-81 (1982)(Brennan, J., concurring in the judgment); *South Dakota v. Opperman*, 428 U.S. 364, 396 (Marshall, J., dissenting).

According to well-established state judicial precedent, "due process of law" in the South

Carolina Constitution means "'the common law and the statute law existing in this state at the time of the adoption of the constitution.'" *Stehmeyer v. City Council*, 53 S.C. 259, 31 S.E. 322, 330 (1898). Due process of law, in other words, means "the law of the land" at the time of the adoption of the constitution. *Simmons v. Western Union Tel. Co.*, 63 S.C. 525, 41 S.E. 521, 522 (1902).

W. Thomas Causby of the South Carolina bar, after careful study of the law prohibiting abortion at the time of the adoption of Article I, Section 3, has concluded that the anti-abortion statute protected the life of preborn children without regard to whether the child had "quickened" in the womb. 1 *SOUTH CAROLINA JURIS.* 25-28 (1991). Thus, the law of the land or due process of law protected a child's life from conception.

At the heart of the equal protection of the laws is the prohibition against denial of rights to a class of human beings, refusing to recognize them as legal persons before the law. As the Supreme Court of South Carolina recognized nearly one hundred years ago, the equal protection guarantee of Article I, Section 3 prohibited a law that conferred a benefit on one class of human beings, but denying it to another solely on the basis of the color of their skin. *Porter v. Charleston & S. Ry. Co.*, 63 S.C. 108, 111 (1902).

Likewise, for South Carolina to afford the benefit of its homicide laws to one class of human beings, to the exclusion of another class, would be a denial of equal protection of the laws. Yet, that is precisely the result when the state does not extend the benefit of its homicide laws to human beings not yet delivered from the womb of their mothers, as contrasted to those who are so delivered.

H. 3252 rectifies this denial of equal protection, by recognizing that the constitutional protections afforded persons in Article I, Section 3 must include human beings from the moment of fertilization. Otherwise, the State Constitution fails to fulfill its primary purpose, to preserve and perpetuate the liberties that God has given to **all** human beings, regardless of their status.

In conclusion, H. 3252 is constitutional, not in conflict with *Roe v. Wade*, because it is based upon an independent and adequate state constitutional ground which grants a more expansive right to life than the one afforded by the federal constitution as interpreted by the United States Supreme Court.

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By a vote of 4 to 1, the Constitutional Law Subcommittee of the South Carolina House failed to report H. 3252 to the full committee. None of the three "pro-life" Republican members of the subcommittee voted in favor of the bill. Indeed, the Republican Chairman of the Committee stated publicly that Roe v. Wade prevented the state legislature from taking any such action. The only positive vote came from Representative Fletcher Smith, a Democrat. Knowing Steve Lefemine, the South Carolina legislature will see H. 3252 again.

We had hoped to get this newsletter out to you at the beginning of the summer, but I have been on the run since early June with the foundation work taking me from Colorado to the state of Washington, back to Colorado, and to Hampton, Virginia, and my law practice taking me to Texas, Utah, and Alabama. The Spirit of God is moving across the nation, urging His people to take the initiative, and to stop allowing the enemy to set the public policy agenda for the nation.

We do appreciate your gifts to the Foundation which allow us to continue this work. As God leads, mail your tax-deductible gift to P.O. Box 16448, Chesapeake, VA 23322.