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April 19, 2006

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Dear Mr. Thompson:

You asked my opinion on the Proposal to amend the Michigan Constitution to provide that:

> "A 'person', for purposes of the Constitution and laws of the State of Michigan, exists from the moment of conception."
>
> "The right to due process, whereby no person shall be deprived of life, liberty, or property without due process of law, guaranteed in Article 1, Section 17, and the right to equal protection of the law, guaranteed in Article 1, Section 2, vest at conception."

I understand that certain pro-life organizations oppose the petition drive to place this Proposal on the Michigan ballot. That opposition, in my opinion, is irresponsible. The Proposal, is prudent, timely and positive.

The essential holding of *Roe v. Wade,* 410 U.S. 113 (1973), is that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. The Court so ruled without resolving the question of whether the unborn child is a living human being. 410 U.S. at 159. In numerous cases since *Roe*, facts demonstrating the humanity of the unborn child have been presented to the Supreme Court, but the Court has declined to decide that question. Instead, the Court has rested on the basic holding of *Roe* that, whether or not the unborn child is a human being, he is a nonperson for purposes of the Fourteenth Amendment. The Court, however, declined to decide whether the unborn child is a human being because of what it regarded as a lack of a professional consensus on that point. Now, 33 years after *Roe*, the evidence of the humanity of the victim of abortion is compelling beyond any rational doubt.

In *Roe*, Texas claimed that, "apart from the Fourteenth Amendment, life begins at conception and . . . the State has a compelling interest in protecting that life." 410 U.S. at 159. The Court said, "We need not resolve the difficult question of when life begins. When those trained in . . . medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159. More than three decades after *Roe*, sound professional practice would permit, and even require, the presentation to the Court of the detailed and compelling evidence that has emerged over those decades which places beyond any doubt the conclusion that human life begins at conception. In any civilized and just society in which legal personhood is the condition for the possession of basic rights, all human beings are entitled to be treated as persons. The Proposal would, therefore, open for the Court the question of the humanity of the unborn child through its affirmation that a "person' . . . exists from the moment of conception."

Sound practice also justifies and even requires the presentation to the Court of the abundant evidence that has come to light over those three decades to prove beyond any rational doubt that abortion is generally harmful to the mother and society as well as to her unborn child and her relationship with the child. The Proposal would open the way to present such evidence to the Court in the context of defining and protecting the rights of unborn persons.

In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court insisted on considering public school segregation in light of present (1954) realities rather than as if it were still 1868, when the Fourteenth Amendment was adopted, or 1896, when *Plessy v. Ferguson* decreed the "separate but equal" doctrine. The relevant paragraph from the Court's opinion in *Brown* is instructive as modified to fit the abortion issue:

> "In approaching this problem we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 [1973] when *Plessy v. Ferguson* [*Roe v. Wade*] was written. We must consider public education [abortion] in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools [abortion] deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 492-93.

The Proposal would present the basic abortion question to the Supreme Court in light of the advanced knowledge gained since *Roe*.

The Proposal also explicitly affirms the right to life of the unborn child as a "person" under the Michigan Constitution. The Supreme Court has recognized in numerous situations "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." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Under Supreme Court precedents, therefore, a state can expand, but not contract, the protection given to a constitutional right by the Supreme Court. See William J. Brennan, "The Bill of Rights and the States," 61 N.Y.U.L. Rev. 371 (1986); William J. Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977); Alexander Wohl, "The Hazelwood Hazard: Litigating and Legislating in the State Domain When Federal Avenues Are Closed," 1 St. Thomas Law Review 1 (1992). The Proposal affirms, as a matter of state law, that unborn human beings are persons entitled to the due process protections of the Michigan Constitution. The Proposal would provide to unborn human beings greater protections under Michigan law than are provided by the Supreme Court under the Fourteenth Amendment. This would not merely restrict the abortion right, but would extend to unborn human beings a right, the right to life, which the Michigan Constitution guarantees as a matter of state law.

There is nothing in the decisions of the Supreme Court of the United States which conclusively forbids Michigan to define and protect the rights of the unborn child beyond the extent to which those rights are recognized and protected under the United States Constitution. The Proposal, therefore, cannot be dismissed as a futile exercise. Rather, in my opinion, it is an affirmation not only of the rights of the unborn child under Michigan law but also of the reserved power of the State of Michigan to define, as a matter of state law, the meaning and scope of the Michigan Constitution. It is an affirmation of the federalism embodied in the general structure of the United States Constitution as well as in the Tenth Amendment.

The Proposal is an important step forward in the effort to restore legal protection for the right to life of all human beings. And the time is right for such an initiative. The increased public concern about abortion, in light of advancing knowledge, makes this an appropriate time to present to the newly configured Supreme Court a clear and measured enactment, such as this Proposal, to invite the Court to address the issue. There is nothing to lose and everything to gain by offering such a straightforward presentation of the issue for the consideration of the Supreme Court.

Sincerely,

Charles E. Rice

Charles E. Rice
Professor Emeritus of Law