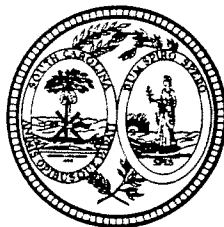


7944 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

March 30, 2005

The Honorable G. Ralph Davenport, Jr.
Member, House of Representatives
522A Blatt Building
Columbia, South Carolina 29211

Dear Representative Davenport:

You have requested an opinion "on the constitutionality of House Bill 3213, the Right to Life Bill, which I have introduced this year." With the caveat set forth herein, it is our opinion that this legislation is most probably constitutional.

Law / Analysis

H. 3213 provides as follows:

Whereas, the General Assembly, under Article III, Section 1A of the Constitution of the State of South Carolina, 1895, is empowered to assemble to make new laws, as the common good may require; and

Whereas, Article I, Section 3 of the Constitution of the State of South Carolina, 1895, guarantees that no person may be deprived of life, liberty, or property without due process of law or denied the equal protection of the laws; and

Whereas, the General Assembly in the exercise of its constitutional powers and in carrying out its duties and responsibilities under the law finds it necessary and proper to ensure that the rights of its citizens extend to each newly born and preborn human person. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 1, Chapter 1 of the 1976 Code is amended by adding:

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“Article 5
Right to Life

Section 1-1-310. This article may be cited as the ‘Right to Life Act of South Carolina.’

Section 1-1-320. The right to due process, whereby no person may be deprived of life, liberty, or property without due process of law and the right to equal protection of the laws, both of which rights are guaranteed by Article I, Section 3 of the Constitution of this State, vest at fertilization.”

SECTION 2. This act takes effect upon approval by the Governor.

Standard of Constitutionality

We begin our analysis of your question with reference to a number of generally applicable legal principles concerning the power of the General Assembly and the standard by which an act of the Legislature is to be adjudged unconstitutional. Our Supreme Court has previously noted that “[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits” *Scroggie v. Scarborough*, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is “[p]resumed to have acted within ... [its] constitutional power.” *State v. Solomon*, 245 S.C. 550, 572, 141 S.E.2d 818 (1965).

Moreover, our Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are expressly enumerated. *State ex rel. Thompson v. Seigler*, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. A statute will not be considered void unless its unconstitutionality is clear beyond a reasonable doubt. *Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539 (1937); *Townsend v. Richland Co.*, 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute’s constitutional validity. More than anything else, only a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While we may comment upon an apparent conflict with the Constitution, we may not declare the Act void. Put another way, a statute “must continue to be followed until a court declares otherwise.” *Op. S.C. Atty. Gen.*, June 11, 1997.

Abortion Decisions

We must also acknowledge at the outset the decisions of the United States Supreme Court concerning abortion. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed its principal holding in *Roe v. Wade*, 410 U.S. 113 (1973), that prior to “viability ... the woman has a right to choose to terminate her pregnancy.” 505 U.S. at 870 (plurality opinion). Although the *Casey* Court more or less dismantled its earlier trimester dichotomy

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enunciated in *Roe*, the Court nevertheless concluded that “a law designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability” violates the federal Constitution. *Id.* at 877. In the Court’s view, an “undue burden is ... shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* However, as *Casey* also teaches, “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.* at 879 (quoting *Roe v. Wade, supra* at 164-165). Subsequently, in *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000), the Court affirmed *Casey*’s analysis, as set forth above, in the context of so-called “partial birth” abortions. There, the Court concluded that Nebraska’s ban on partial birth abortions must include an exception for the health of the mother. Absent an inclusion of a provision authorizing a partial birth abortion if, such procedure is deemed medically necessary for the mother’s health, the Court concluded that the ban upon partial birth abortions places an “undue burden” upon a woman’s right to an abortion, and thus was unconstitutional.

In *Webster v. Reproductive Health Services, et al.*, 492 U.S. 490 (1989), the Court considered the issue of the constitutionality of the preamble of a Missouri statute regulating abortions. In the preamble, the Missouri Legislature made “findings” that “[t]he life of each human being begins at conception.” Furthermore, the Legislature found that “[u]nborn children have protectable interest in life, health and well-being.” *See*, 492 U.S. at 504. The preamble further stated that unborn children are to be provided “all the rights, privileges, and immunities available to other persons, citizens and residents” of the state of Missouri pursuant to the applicable laws of that state. *Id.*

The Eighth Circuit invalidated as unconstitutional the Missouri preamble, relying upon the Supreme Court’s statement in *Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416, 444 (1983) that “a State may not adopt one theory of when life begins to justify its regulation of abortions.” The Court of Appeals rejected Missouri’s argument that the Missouri preamble was “abortion-neutral” and “merely determine[d] when life begins in a nonabortion context, a traditional state prerogative.” 851 F.2d 1071, 1076 (8th Cir. 1988). In the opinion of the Eighth Circuit, “[t]he only plausible inference” in a bill in which “every remaining section save one regulates the performance of abortions” is that “the state intended its abortion regulations to be understood against the backdrop of its theory of life.” *Id.*

When the case reached the United States Supreme Court, Missouri argued that the statute’s preamble was precatory, and did not restrict abortions in any substantive way. The state’s contention was that the preamble’s definition of life could, for example, prevent physicians in public hospitals from dispensing certain forms of contraceptives. 492 U.S. at 504. Based upon these arguments, the Supreme Court refused to pass upon the constitutionality of the Act’s preamble, stating as follows:

[i]n our view, the Court of Appeals misconceived the meaning of the *Akron* dictum, which was only that a state could not “justify” an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State’s view about when life begins. Certainly, the preamble does not by its terms regulate abortion or any other aspect of appellees’ medical practice. The Court has emphasized that *Roe v. Wade* “implies no limitation on the authority of a state to make a value judgment favoring child birth over abortion.” *Maher v. Roe*, 432 U.S. at 474, 97 S.Ct. at 2382-83. The preamble can be read simply to express that sort of value judgment.

We think the extent to which the preamble’s language might be used to interpret other statutes or regulations is something that only the courts of Missouri can definitively decide. State law has offered protections to unborn children in tort and probate law, see *Roe v. Wade, supra*, 410 U.S. at 161-162, 93 S.Ct., at 730-731, and § 1.205.2 can be interpreted to do no more than that

It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. Until then, this Court is not empowered to decide ... abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.” *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409, 21 S.Ct. 206, 208, 45 L.Ed. 252 (1900)

492 U.S. at 506-507. Although it is clear that the Court in *Webster* abstained from directly addressing the constitutionality of the Missouri preamble, constitutional scholars have read the foregoing discussion by the *Webster* Court as serving a “... signal [to] the state legislatures that moment of conception statutes, while potentially constitutionally suspect if applied to abortion regulations, will be favorably received in non-abortion cases.” Spahn and Andrae, “Mis-Conceptions: The Moment of Conception In Religion, Science and Law,” 32 U.S.F.L.Rev. 261, 314 (Winter, 1998).¹

¹ In dissent, Justice Stevens was of the opinion that the Missouri preamble was unconstitutional because it violated the constitutional right of privacy as set forth in *Griswold v. Connecticut*, 381 U.S. 479 (1965), as well as the First Amendment’s Establishment Clause. Justice Stevens concluded that “[b]ecause I am not aware of any secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization, I believe it inescapably follows that the preamble to the Missouri statute is invalid under *Griswold* and its progeny.” 492 U.S. at 566. (Stevens, J., concurring and dissenting).

In addition, Justice Stevens believed that the Missouri preamble’s lack of a secular purpose violated the Establishment Clause. He concluded that distinguishing between pre- and post-
(continued...)

The Evolving Law Protecting Fetal Rights

Our analysis must also address the existing law concerning fetal rights outside the context of abortion. It is well established that the English common law did not recognize a fetus as a "person." A child must have been born alive, and existed independently of the mother's body before the child was considered a "person" for the purposes of the law of homicide. This general rule was adopted by virtually every American court, including our own. As our Supreme Court concluded almost one hundred years ago in *State v. O'Neill*, 79 S.C. 571, 60 S.E. 1121 (1908), "[i]n cases of infanticide it must be shown that the child was born alive, and for this purpose an independent circulation is necessary." (quoting 1 Wharton's *Criminal Law* (8th Ed.) p. 336). The Court elaborated that "... it must be proven that the child had been born in the world in a living state. The fact that it has breathed for a moment is not conclusive proof thereof." *Id.*

One scholar has observed that "[t]he born alive rule was adopted by American courts for numerous reasons." Such reasons include the following:

[f]irst, since medical science lacked sophisticated techniques in the area of forensic medicine, the born alive rule conferred "the important nexus between the conduct of the defendant and the death of the fetus." Furthermore, a presumption existed that the fetus would not be born alive as a result of the high prenatal mortality rates Finally, it was presumed that a woman was incapable of acting rationally during childbirth and as a result she was excused from killing her fetus.

Leventhal, "The Crimes Against The Unborn Child Act: Recognizing Potential Human Life In Pennsylvania Criminal Law," 103 *Dick L. Rev.* 173 (Fall, 1998).

Gradually, however, the common law rule has been eroded both by state legislatures and state courts. Increasingly, the born alive requirement has come to be viewed as archaic and one which fails to protect human life. As of 1998, it was noted that

[w]ithout ever seeing the light of day, or extracting a breath of fresh air, a fetus is gradually acquiring legal protection as a "person" in the United States. ... By way of legislation ... or court decisions, half of the fifty states prohibit the killing of a fetus outside the domain of legal abortion In every state, infanticide, the killing of a

¹(...continued)

fertilization regulation rested primarily in a longstanding theological debate. He reviewed the evolving theology of the Roman Catholic Church on the question of when the soul enters the body. Thus, in Justice Stevens' view, "[t]he Missouri Legislature may not inject its endorsement of a particular religious tradition into this debate, for "[t]he Establishment Clause does not allow public bodies to foment such disagreement." *Id.* at 571 (Stevens, J., concurring and dissenting, quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 651 (1989)).

newborn, is considered homicide If an infant takes one breath, the infant is legally a child who has been murdered Many states have enacted separate fetal homicide statutes that criminalize the killing of a fetus from the time of conception ... or from the state of quickening. ... California criminalizes the killing of a fetus that has progressed beyond the embryonic state to seven to eight weeks. ... A few states have amended their homicide statutes to include the separate category of fetus. ... In some states it is a crime for a mother to kill her own viable fetus; ... while others, Minnesota for example, forbid prosecution of the mother Furthermore, some states, including Oklahoma, ... South Carolina, ... and Massachusetts, ... do not have fetal homicide legislation, but consider the killing of a viable fetus murder as the result of landmark court decisions.

Id., at 177-178.

South Carolina's case law has also evolved considerably since *State v. O'Neill*, *supra* was decided by our Supreme Court in 1908. We will discuss this decisional evolution in greater detail below. Suffice it to say here, however, that the South Carolina Supreme Court has held in several decisions over the past several years that a viable fetus is entitled to recognition as a "person."

Effect of Moment of Conception Statutes and Decisional Law Upon *Roe v. Wade*

The Missouri courts have consistently applied in non-abortion contexts the preamble, referenced above, which declares life to begin at the moment of conception. In *Conner v. Monkem Co., Inc.*, 898 S.W.2d 89 (Mo. 1995), an *en banc* Missouri Supreme Court confronted the question of whether a parent could state a claim for the death of an unborn child. The Court noted that "[t]he precise question before us is whether a nonviable unborn child is a 'person' capable of supporting a claim for wrongful death" *Id.*, at 90. At issue was whether the Missouri "moment of conception" statute served to insure that there is a cause of action for the unborn child's wrongful death.

Even though the Missouri wrongful death statute had not been itself amended to reflect the Legislature's sentiments concerning the rights of unborn children, the Supreme Court of that state concluded that the statute did provide the Court with legislative guidance as to whether an unborn child is a "person" for wrongful death purposes. In the Court's view,

[w]hile § 1.205(2) does not mandate any particular result, as would an express amendment of § 537.080, we cannot avoid the conclusion that the legislature intended the courts to interpret "person" within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability. ... See *State v. Knapp*, 843 S.W.2d 345 (Mo. banc 1992). Especially persuasive to this conclusion is the language of § 1.205.1(3), which provides that "the natural parents of unborn children have protectable interests in the life, health and well-being of their unborn child."

IV.

We recognize that the majority of other jurisdictions in America limit recovery to viable unborn children. Most of the decisions from these jurisdictions construe general statutes with little or no guidance as to whether unborn children, viable or not, should be considered as persons for a wrongful death claim. Prior to the effective date of § 1.205.2, Missouri was numbered among them.

Little hesitancy has been shown, however, to give effect to more specific and inclusive direction by legislative bodies, either by specific amendment to a wrongful death statute; *see, Seef v. Sulkus*, 145 Ill.2d 336, 164 Ill.Dec. 594, 583 N.E.2d 510 (1991); *Farley v. Mount Marty Hosp. Ass'n*, 387 N.W.2d 42 (S.D. 1986), or by a separate statute to be read in *pari materia* with a wrongful death statute, *see Porter v. Lassiter*, 91 Ga.App. 712, 87 S.E.2d 100 (1955); *Danos v. St. Pierre*, 402 So.2d 633 (La. 1981).

As the question before us is one of statutory construction, we must be more sensitive to legislative direction and less sensitive to our own evaluation of policy considerations. Thus, the legislature's relatively clear expression in § 1.205 that parents and children have legally protectable interests in the life of a child from conception onward must be accorded greater weight than the many other and obvious difficulties associated with the type of claim here asserted.

Similarly, the Missouri Supreme Court held in *State v. Knapp, supra* that the "moment of conception" statute had the effect of making an unborn child a "person" for purposes of its involuntary manslaughter statute. There, the Court rejected the argument that it was necessary to insert in the text of the manslaughter statute that unborn children are "persons" because "that information is supplied by §1.205." Thus, in the Court's opinion, the "moment of conception" statute controlled with respect to the definition of "person" for purposes of the manslaughter statute. Moreover, the *Knapp* Court rejected the argument that the Missouri moment of conception statute related only to abortions.

And, in *State v. O'Brien*, 784 S.W.2d 187 (Mo. Appeals 1990), the Missouri Court of Appeals concluded that the very same moment of conception statute "... is qualified by not only the preamble, but also the continuing principle that abortion is, under *Roe [v. Wade, supra]* and *Webster [v. Reproductive Health Services, et al., supra]*, constitutionally protected." Thus, according to the Court, "[w]hatever rights an unborn may have in tort or probate or other areas of the law ..., and notwithstanding the fact that the moment of conception statute 'attempts to assure that ... the laws of Missouri should be interpreted to give the same rights to the unborn as every other person has, [nonetheless] the rights, privileges, and immunities of the unborn are ... subject to ... [rights protected by the federal] Constitution.'" Accordingly, the Court concluded, "abortion remains a constitutionally protected right." *Id.*, at 192.

Other courts have similarly concluded that a recognition of the same rights with respect to unborn children as are possessed by other persons – either by statute or court decision – does not violate *Roe v. Wade* or *Casey* and does not undermine the constitutionally protected right to an abortion, so long as such rights are provided only in a non-abortion context. See, *66 Federal Credit Union v. Tucker*, 853 So.2d 104 (Miss. 2003); *State v. Bauer*, 471 N.W.2d 363 (Ct. App. Minn. 1991); *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996); *Farley v. Sartin*, 466 S.E.2d 522 (W.Va. 1995).

In *Wiersma*, the South Dakota Supreme Court distinguished the constitutional right of a woman to an abortion from the actions of a third party tortfeasor in harming an unborn non-viable fetus. Deciding the case in the context of the State's wrongful death statute, the Court concluded that "the use of abortion rights analysis, simply has no applicability here. A choice to abort sanctions a mother's decision, not someone else's." It would be incongruous, concluded the Court, to "give the tortfeasor the same civil rights as the mother to terminate the pregnancy." 543 N.W.2d at 791. The Court quoted with approval *People v. Ford*, 221 Ill. App.3d 354, 581 N.E.2d 1189 (1991), which stated that "[c]learly a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated." *Id.*, (quoting *People v. Ford*, 581 N.E.2d at 1199).

Moreover, in *66 Federal Credit Union v. Tucker*, *supra*, the Mississippi Supreme Court *en banc* ruled that the term "person" in that State's wrongful death statute includes a fetus which is "quick" in the womb. One of the questions raised by the dissent was whether the Court's conclusion would adversely impact the Supreme Court's decision in *Roe v. Wade*. The majority rejected such a contention, stating that

[w]e conclude that *Roe* is not implicated here. [Citing *People v. Ford* and *Wiersma*, the Court also noted that] ... [o]ur sister state of West Virginia has also concluded that *Roe* is not implicated in the issue now before the court, stating that "[t]he abortion question simply is not relevant to wrongful death." See *Farley v. Sartin*, 466 S.E.2d at 534. The dissent's alleged concerns about physicians performing abortions is but a smokescreen and a thinly disguised ruse which raises no legitimate concerns. Physicians performing abortions are still afforded protection by our criminal statute ... and under the principles of *Roe v. Wade*.

853 So.2d at 114.

State v. Merrill, 450 N.W.2d 318 (Minn. 1990) is also instructive. There, the Minnesota Supreme Court upheld those state statutes which made it a crime under Minnesota law to murder an "unborn child" as constitutionally valid against a variety of challenges. The relevant Minnesota statute defined an "unborn child" as one existing at any stage of fetal development.

In *Merrill*, defendant first attacked the statutes as an infringement under the Equal Protection Clause. He premised his argument on *Roe v. Wade*, urging that *Roe* instructs that a nonviable fetus

equal protection challenge to the feticide statute. *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir.1987).

We conclude that sections 609.2661(1) and 609.2662(1) do not violate the Fourteenth Amendment by failing to distinguish between a viable and a nonviable fetus.

450 N.W.2d at 321-322.

In addition, the *Merrill* Court found that the Minnesota statutes did not violate the Due Process Clause as being void for vagueness. Defendant contended that the statutes failed to give fair warning to potential violators and were thus void. However, the Court concluded that “[t]he possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude.” *Id.*, at 323. Moreover, the Court concluded that the Legislature’s failure to define in the statute the phrase “causes the death of an unborn child” did not invite arbitrary enforcement. The Court stated that “[w]hatever one might think of the wisdom of this legislation, and notwithstanding the difficulty of the proof involved, we do not think it can be said that the offense is vaguely defined.” *Id.*, at 324.

Further, in *State v. Bauer, supra* the Minnesota Court of Appeals rejected any argument that the Minnesota fetal homicide statutes violated the Establishment Clause of the First Amendment. Citing *State v. Merrill, supra*, the Court concluded that the statutes possessed a secular purpose. Thus, the Court concluded:

[t]he imposition of criminal liability is generally a secular matter, and prohibiting the termination of a pregnancy was not necessarily done to serve a religious purpose. Moreover, a law may satisfy the “secular purpose” test even though it may be motivated in part by a religious purpose. See *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489, 86 L.Ed.2d 29 (1985). Bauer has not shown that the severity of the Minnesota statutes, noted in *Merrill*, 450 N.W.2d at 321, infects its purpose, making it non-secular in intent.

471 N.W.2d at 365-366.

South Carolina Cases

As noted earlier, our own Supreme Court has, in a variety of non-abortion contests, recognized that a viable fetus is a “person.” In *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), the Court concluded that, for purposes of the wrongful death statutes, a fetus which reaches viability – “having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person.” *Id.*, at 263. And in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), the Court concluded that a viable fetus injured while still in the womb need not

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be born alive in order for another to sue for the wrongful death of the fetus. The *Fowler* Court stated that

[s]ince a viable child is a person *before separation from the body of its mother* and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an act, neglect or default' by the defendant, to the injury of the child

Once the concept of the unborn, viable child as a person is accepted, we have no difficulty in holding that a cause of action for tortious injury of such child arises immediately upon the infliction of the injury.

Id., at 613. (emphasis in original).

In the criminal context, our Supreme Court has decided the cases of *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), *Whitner v State*, 328 S.C. 1, 492 S.E.2d 777 (1997) and *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003), all of which have recognized that a viable fetus is a "person" for purposes of criminal liability resulting from the infliction of harm upon the unborn child. In *Horne*, the Court upheld the conviction of voluntary manslaughter upon a viable fetus in a case in which the mother, nine months pregnant, was stabbed repeatedly.

In *Whitner*, a case involving a mother's ingestion of crack cocaine during the third trimester of pregnancy, the Court held that a viable fetus is a "child" within the meaning of the child abuse and endangerment statute. Relying upon *Hall*, *Fowler* and *Horne*, the Court stated that it was "well aware of the many decisions from other states' courts throughout the country holding maternal conduct before the birth of the child does not give rise to criminal prosecution under state child abuse/endangerment statutes." *Id.*, at 11. However, in the majority's view, the "plain meaning" of the statute required the conclusion that a viable fetus was included within the statute's reach. Moreover, the majority opinion, authored by Justice (now Chief Justice) Toal, disagreed with the argument that the Court's interpretation conflicted with *Roe v. Wade*. In the majority's opinion,

[f]irst, the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling. *See, e.g. Roe v Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The United States Supreme Court in *Casey* recognized that the State possesses a profound interest in the potential life of the fetus, not only after the fetus is viable, but *throughout* the expectant mother's pregnancy. *See Casey*, 505 U.S. at 877, 112 S.Ct. at 2821, 120 L.Ed.2d. at 716 (plurality opinion).

Even more importantly, however, we do not think any fundamental right of *Whitner's*—or any right at all, for that matter—is implicated under the present scenario. It strains belief for *Whitner* to argue that using crack cocaine during pregnancy is

encompassed with the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

Id., at 17-18.

Likewise, in *McKnight*, the Court upheld a conviction for homicide by child abuse of a mother who had ingested cocaine, resulting in the death of her viable fetus. The *McKnight* Court reaffirmed its holding in *Whitner*. Moreover, the Court also disagreed with defendant's assertion that application of the homicide by child abuse statute violated due process because "she had no notice the statute could be applied to a woman whose fetus is stillborn." *Id.*, at 649. In the Court's view, such an argument possessed no validity because of the preceding cases in which the Court had held that a viable fetus constituted a "person." The *McKnight* majority traced the Court's decisions as follows:

[i]n numerous cases since 1960, we have held that a viable fetus is a person. *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984). In *Whitner*, *supra*, we reiterated the fact that a viable fetus is a child within the meaning of the child abuse and endangerment statute. Most recently, we held that a viable fetus is both "person" and "child" as used in statutory aggravating circumstances which provide for death penalty eligibility. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). ...

[A] person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life. Under *Whitner*, taking cocaine while pregnant constitutes neglect and, as discussed in Issue 1 above, it was a jury question whether McKnight acted with extreme indifference to human life. Given the ample authority in this state finding a viable fetus to be a person, we find McKnight was on notice that her conduct in ingesting cocaine would be proscribed. ...

Id., at 650. Similarly, based upon *Whitner*, the Court found that McKnight's right to privacy was not infringed, concluding "that prosecution for abuse and neglect of a viable fetus due to the mother's ingestion of cocaine violates [no] ... fundamental right." *Id.* at 651. Moreover, the Court rejected any Eighth Amendment argument that punishment under the homicide by child abuse statute constituted cruel and unusual punishment. *Id.*, at 652-653.

However, in *Crosby v. Glasscock Trucking Co., Inc.*, 340 S.C. 626, 532 S.E.2d 856 (2000), the Court refused to conclude that a wrongful death action could be brought on behalf of a nonviable stillborn fetus. The Court relied upon *West v. McCoy*, 233 S.C. 369, 105 S.E.2d 88 (1958) which had held that no wrongful death action could be brought in such a circumstance. Finding that “*West* is still valid and controls this case ...,” the majority rejected the dissent’s contention that allowing an action on behalf of a nonviable, but born alive fetus was no different from the case present in *Crosby* – “where the fetus is not born alive.” *Id.*, at 857. The majority stressed that in its other previous wrongful death decisions involving an unborn child, the fetus had been viable. Thus, “consistent with our decision in *West*,” the Court sided with “the majority of courts [which] ... have held a nonviable stillborn fetus cannot maintain an independent wrongful death action.” *Id.* However, the majority also emphasized that any change in the law in this area should come from the Legislature. *Id.*

Justice (now Chief Justice) Toal wrote a powerful dissent. She noted it to be generally accepted that “a child may recover for prenatal injuries incurred either before or during viability, so long as the child is born alive.” *Id.*, at 638. In her view, it is illogical to allow a cause of action to a fetus injured after viability, “while denying the same cause of action to a child whose injury occurred only a few weeks earlier during the nonviability stage.” *Id.* Likewise, Justice Toal

... would hold that a nonviable fetus must also be considered a person for purposes of the wrongful death since, had death not ensued, the fetus would have been able to maintain an action. See *Fowler*, 244 S.C. at 614, 138 S.E.2d at 45 *A wrongful death cause of action should cover death at any point during fetal development beginning with conception.* I recognize that nonviable fetuses, like fetuses that have reached the viability stage, may not always arrive at a successful birth. ... However, in cases where it can be shown that a defendant’s wrongful conduct terminated the fetus’ normal progression, I find no logical basis for attaching legal importance to the concept of viability.

Id., at 638-639 (emphasis added).

Importantly, Justice Toal addressed the issue of what impact, if any, her conclusion that an action could be brought on behalf of a nonviable stillborn fetus under the wrongful death statute might have on *Roe v. Wade* and its progeny. Like other courts, referenced above, Justice Toal concluded that there exists a clear federal constitutional difference between the recognition of a nonviable fetus as a “person” in the abortion context, and the assignment of rights to an unborn child in tort law and other areas. Her commentary in this area is particularly instructive here:

I realize that, if adopted, my position would be examined for its implications beyond the context of the wrongful death statute. For instance, it may be argued that my approach to the interpretation of “person” under the wrongful death statute could erode a woman’s reproductive rights in the abortion context. However, I caution against any such inferences. My interpretation of “person” in this case is unique to

the wrongful death statute and is further informed by principles of tort law. The United States Supreme Court has addressed the abortion controversy by balancing a woman's reproductive rights under the federal Constitution against the state's interests in protecting unborn children. *See Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147. In balancing these interests, the Supreme Court has held that, prior to viability, the state may not prohibit a woman from making the choice to terminate her pregnancy. *See Planned Parenthood, supra*. However, the Court has expressly acknowledged that where there is no protected liberty interest at stake, the government can adopt any view of life it desires:

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty.

Planned Parenthood, 505 U.S. at 851, 112 S.Ct. at 2806-07, 120 L.Ed.2d 674 (citations omitted).

Unlike the abortion cases, wrongful death actions do not automatically implicate any countervailing, constitutional liberties. No one can argue in this case that the state or federal constitution shields the defendants' allegedly wrongful conduct. Without any protected liberty interest to balance, we are free to define "person" under the South Carolina wrongful death statute in a way that conforms with the law's purpose. In keeping with this Court's prior decisions which have liberally construed the wrongful death statute, I believe a definition of "person" that includes life from the point of conception comports with the statute's goal of affording a remedy to parties who could have sued if they had survived.

Other Authorities

The noted constitutional scholar, Ronald Dworkin, has also commented as to the constitutionality of a statute which declares that an unborn child, from conception, possesses the same rights as every other person outside the abortion context. Mr. Dworkin concludes that such a statute would be constitutional, stating as follows:

[t]here is no doubt that a state can protect the life of a fetus in a variety of ways. A state can make it murder for a third-party intentionally to kill a fetus, as Illinois has done, for example, or "feticide" for anyone willfully to kill a quickened fetus by an injury that would be murder if it resulted in the death of the mother, as Georgia has. These laws violate no constitutional rights, because no one has a constitutional right to injure with impunity. ... Laws designed to protect fetuses may be drafted in language declaring or suggesting that a fetus is a person, or that human

life begins at conception. The Illinois abortion statute begins, for example, by declaring that a fetus is a person from the moment of conception. ... There can be no constitutional objection to such language, so long as the law does not purport to curtail constitutional rights. The Illinois statute makes plain, for example, that it does not intend to challenge or modify *Roe v. Wade* so long as that decision remains in force. ...

So qualified, a declaration that a fetus is a person raises no more constitutional difficulties than states raise when they declare, as every state has, that corporations are legal persons and enjoy many of the rights real people do, including the right to own property and the right to sue. States declare that corporations are persons as a shorthand way of describing a complex network of rights and duties that it would be impossible to describe in any other way, not as a means of curtailing or diminishing constitutional right that real people would otherwise have.

The suggestion that states are free to declare a fetus a person, and thereby justify outlawing abortion, is a very different matter, however. That suggestion assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.

We find the foregoing reasoning persuasive. *See also, People v. Davis*, 30 Cal. Repr.2d 50, 872 P.2d 591, 597, 599 (1994) [California Supreme Court *en banc* concluded that the viability of fetus is not an element of fetal murder. Court concluded that "... *Roe v. Wade* ... does not hold that the state has no legitimate interest in protecting the fetus until viability ... [W]hen the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide"].

With this constitutional background, we turn now specifically to H. 3213. We first note that our Supreme Court has consistently recognized that a constitutional interpretation is to be preferred over an unconstitutional one. As the Court stated in *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196, 525 S.E.2d 872, 883 (2000) "[a] possible constitutional construction must prevail over an unconstitutional interpretation." (Citing *Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331 (1977). *See also, State v. Peake*, 353 S.C. 499, 579 S.E.2d 297, 300 (2003) [statute must be read to avoid conflict with Article V, § 24 of the South Carolina Constitution which "vests sole discretion to prosecute criminal matters in the hands of the Attorney General."] Of course, federal constitutional law is controlling over state law under the Supremacy Clause of the federal Constitution. *See, Art. VI, cl. 2; Whitcomb v. Chavis*, 403 U.S. 124, 180 (Douglas, Brennan and Marshall, JJ., dissenting in part and concurring in the result) [state law must "give way to the requirements of the Supremacy Clause when there is a conflict with the Federal Constitution."].

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If H.3213 is enacted, other principles of statutory construction would also be relevant as well. In this regard, the primary goal of statutory interpretation is to ascertain the intent of the General Assembly. *State v. Martin*, 293 S.C. 46, 358 S.E.2d 697 (1987). In determining the meaning of a statute, it is proper to consider other statutory provisions relating to the same subject matter. *Southern Ry. Co. v. S.C. State Hwy. Dept.*, 237 S.C. 75, 115 S.E.2d 685 (1960). A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the legislation. *Hay v. S.C. Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). The statute's words must be given their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or expand the statute's operation. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). Different statutes *in pari materia* though enacted at different times, should be construed together as one system and as explanatory of each other. *Fishburne v. Fishburne*, 171 S.C. 408, 172 S.E. 426 (1934).

We note that H.3213 makes no mention whatever of abortion. The Bill simply declares that the "... right to due process ... and the right to equal protection of the laws, both of which are guaranteed by Article I, Section 3 of the Constitution of this State, vest at fertilization." Thus, in view of the foregoing authorities, which uphold similar statutes so long as they are not construed as interfering with a woman's constitutional right of privacy in the abortion context, a court is likely to read H. 3213 in the light most favorable to its constitutionality. This would mean that if enacted, H. 3213 likely would be interpreted by a court as having no impact upon abortions. Viewed thusly, the statute would most probably be upheld by a court as constitutionally valid on its face.

Of course, only a court can interpret H.3213, if enacted, and only a court may apply the language of the legislation to other statutes, such as the South Carolina criminal laws relating to homicide as well as other statutes appertaining to wrongful death. While legislation interpretations are given considerable weight, *see, Acker v. Cooley*, 177 S.C. 144, 181 S.E. 10 (1934), *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978), the meaning of the Due Process Clause and Equal Protection Clauses of the South Carolina Constitution is ultimately a question to be decided by the judicial branch. *See, Evatte v. Cass*, 217 S.C. 62, 59 S.E.2d 638 (1950). As the Supreme Court of California has stated in *Southern California Jockey Club, Inc. v. California Horse Racing Bd. et al.*, 36 Cal.2d 167, 223 P.2d 1, 11 (1950), "[t]his court, and not the Legislature, is the final arbiter of the meaning of the California Constitution." *See also, Marbury v. Madison*, 5 U.S. 137 (1803).

Nevertheless, it is our opinion that H.3213 is constitutional on its face. We believe a court, like the courts referenced above, would conclude that this legislation is valid so long as it is not used to deprive a person of the constitutional right to privacy in the abortion context as recognized in *Roe v. Wade* and its progeny. Moreover, we are of the view that consistent with courts in other jurisdictions, a court would read H.3213 *in pari materia* with other statutes, such as wrongful death and those laws governing homicide, thus giving due deference to the General Assembly's declaration that, beginning with fertilization, a fetus is a "person."

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Conclusion

It is our opinion that H.3213 – the Right to Life Act – is constitutional on its face. Of course, as noted earlier, if H.3213 is enacted, the statute must be interpreted consistently with the United States Supreme Court decisions in *Planned Parenthood v. Casey* and *Roe v. Wade*. Thus, the statute could not be applied in the context of abortion to deny the federal constitutional right to privacy. We note that the proposed legislation does not mention abortion or purport to regulate abortion in any way, as evidenced by the fact that the Bill mentions rights only under the *State Constitution*. Thus, there appears to be no effort by the Legislature to undermine *Casey* and *Roe*. Moreover, we note also that any determination of the meaning of the Due Process and Equal Protection Clauses for purposes of the South Carolina Constitution ultimately lies, pursuant to the requirement of separation of powers, with the South Carolina Supreme Court.

Notwithstanding these obvious caveats, however, we think that a court would uphold the legislation as constitutionally valid. As noted herein, *Roe* and its progeny do not attempt to compel a particular determination of when life may begin for purposes of protection under state law. Thus, the General Assembly is constitutionally free to make such a value judgment outside of the abortion context. Indeed, in the non-abortion setting, the United States Supreme Court has expressly recognized that such a determination concerning if and when a fetus is considered a “person” is a “traditional state prerogative” *Webster, supra*. Such a legislative declaration would, obviously, be given great weight in the courts of South Carolina for purposes of state criminal law, probate law and tort law, as well as other areas. Thus, H.3213 would likely be read by a court as providing strong legislative guidance in those contexts.

Accordingly, it is our opinion that the Right to Life Act is constitutional.

Yours very truly,



Henry McMaster

HM/an