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Memorandum

To: To Whom It May Concern
From: James Bopp, Jr. & Richard E. Coleson
Date: August 7, 2007
Re: Pro-life Strategy Issues

This memorandum addresses how best to advance the pro-life cause at present, including an analysis of current efforts to prevent abortions through "personhood" amendments to state constitutions.

The Big Picture

Roe v. Wade declared a right of privacy that encompassed abortion. 410 U.S. 113 (1973). That case was widely-decried by legal scholars as being without constitutional warrant, but a series of subsequent cases made the declared right virtually absolute, as we demonstrated in a comprehensive law review article that we published in 1989. *See* James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. Law 181 (1989).

In the early years following *Roe*, there was much scholarly debate over how best to obtain reversal of *Roe* by means of a federal statute or constitutional amendment. In 1984, the Horatio R. Storer Foundation published *Restoring the Right to Life: The Human Life Amendment*, which was edited by James Bopp, Jr., who also wrote Chapter 1, "An Examination of Proposals for a Human Life Amendment." The chapter discussed the pros and cons of a variety of proposals and concluded by setting out the language of a proposed human life amendment that had been unanimously approved by the National Right to Life Committee's board of directors in 1981.

The NRLC Amendment was the work of multiple groups of constitutional scholars and consultants over a year of study on how to improve on the Garn Amendment (a then-current proposal) based on meeting eleven vital objectives for a full and proper reversal of *Roe*. "The intent of the NRLC Amendment [wa]s to fully reverse *Roe v. Wade* and meet all of the objectives of full restoration of legal protection to the unborn," wrote Bopp. *Restoring the Right to Life* at 50. "Unlike the Garn Amendment, which meets only eight of the eleven objectives, the NRLC Amendment accomplishes them all," Bopp continued. *Id.*

The **1981 NRLC Amendment** was as follows:

> SECTION 1: The right to life is the paramount and most fundamental right of a person.
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> SECTION 2: With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of amendment to the Constitution, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization.
>
> SECTION 3: No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring as long as such law requires every reasonable effort be made to preserve the life of each.
>
> SECTION 4: Congress and the several States shall have power to enforce this article by appropriate legislation.

Id. at 50-52. As set out below, a current proposal for a constitutional amendment to Georgia's constitution adopts the first two sections of the NRLC Amendment nearly verbatim.

Despite valiant efforts in the 1980s, attempts to reverse *Roe* by a federal constitutional amendment or statute failed (and prospects for doing so now or in the near future are nonexistent in light of current political realities).

Attention also focused on altering the balance of Supreme Court justices supporting *Roe*. In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), Chief Justice Burger switched sides to increase dissenters to *Roe* from three to four. With the arrival of Justice Kennedy on the Court it seemed likely that a majority for reversal had finally been achieved. In fact, during this time the present authors were very active in presenting the Court with an opportunity to reverse *Roe* by bringing a series of cases seeking consideration of the rights of fathers who objected to the planned abortion of their unborn children.[1] But Justice

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[1]The present authors also wrote several scholarly articles advocating reversal of *Roe* during this time. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. Law 181 (1989); Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Penn. L. Rev. 157 (1989); Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 131 (1989); Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1990); Bopp, Coleson & Barry A. Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly*

Kennedy dashed those hopes by joining a reaffirmation of the basic abortion right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. 505 U.S. 833 (1992).

As the Court 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. But those four votes, even if assured, would remain one short of the five necessary to create a majority. 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).

The Supreme Court's current makeup assures that a declared federal constitutional right to abortion remains secure for the present. This means that now is not the time to pass *state* constitutional amendments or bills banning abortion because (1) such provisions will be quickly struck down by a federal district court, (2) that decision will be affirmed by an appellate court, (3) the Supreme Court will not grant review of the decision, and (4) the pro-abortion attorneys who brought the legal challenge will collect statutory attorneys fees from the state that enacted the provision in the amount of hundreds of thousands of dollars. The effort will have enriched the pro-abortion forces for no gain for the pro-life side. In fact, there will be a loss because there will be yet another federal court decision declaring that state law on abortion is superseded by the federal constitution. No amount of stirring rhetoric arguing that the states have a duty to do something to trigger reconsideration of *Roe* changes the hard fact that such an effort is presently doomed to expensive failure. Both passion for the pro-life cause and wisdom about the means to achieve it must be maintained if the pro-life movement is to ultimately succeed.

But if the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg has long advocated—an "equal protection" analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the dissent, written by Justice Ginsberg, in fact did so. *See id.* at 1641 (Ginsberg, J., joined by Stevens, Souter, and Breyer, JJ.) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize all current laws on abortion, such as laws requiring parental involvement for minors, waiting periods, specific informed consent information, and so on. A law prohibiting abortion would force Justice Kennedy to vote to strike

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Reconsider and Overrule Roe v. Wade?, 1 Const. L. J. 55 (1990).

down the law, giving Justice Ginsberg the opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as PBA bans, 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.[2]

An equal protection justification for the declared abortion right was advocated by attorneys for the Planned Parenthood Federation and the ACLU in *Webster v. Reproductive Health Services*. 492 U.S. 490 (1989). It has also been advocated by Harvard Law School Professor Laurence Tribe, among others. *See*, *e.g.* Laurence Tribe, *American Constitutional Law* 1353 n.109 (2d ed. 1988). While an argument can be made that the equal protection clause provides no basis for a right to abortion, *see* Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 136-41, now-Justice Ginsberg has argued that the equal protection clause provides a justification for an abortion right that is superior to the analysis employed in *Roe*. *See* Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L Rev. 375 (1985). And as noted above, four dissenting justices in *Gonzales* have now joined her position. Were the Court to embrace her view that the equal protection clause protects the right to choose abortion on the basis of gender discrimination (in a majority opinion, or even in a plurality opinion), states would likely have to fund abortions that they are not currently required to fund in programs for indigent persons. This has happened in some states that passed an equal rights amendment (which has a similar analytical effect to adopting an equal protection rationale for abortion rights). *See*, *e.g.*, *Fisher v. Dept. Pub. Welfare*, 482 A.2d 1137 (1984), *rev'd*, 502 S.2d 114 (Pa. 1985); *Maher v. Roe*, 515 A.2d 134 (Conn. Super. Ct. 1986).

The pro-life movement was energized by *Roe* in 1973, but wise leaders recognized from the beginning that one of their foremost tasks was to keep abortion alive as an issue. Prohibition of alcoholic beverages is an example of an issue that enjoyed widespread support at one time, leading to the Eighteenth Amendment (1919), but then became a dead issue. If anyone tried to reenact a constitutional ban on alcohol consumption today, he would be dismissed as a Don

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[2]Note that in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), the Court abandoned the trimester scheme of *Roe* but retained a distinction between pre- and post-viability, stating that post-viability abortions could be prohibited provided there was a sufficient health exception. Of course, since *Doe v. Bolton*, 410 U.S. 179 (1973), pro-life scholars and leaders have been trying to cut back on the Court's on-demand definition of the "health" for which an exception must be permitted. In *Gonzales*, 127 S. Ct. 1610, the Supreme Court upheld *on its face* a federal partial-birth abortion ban that applied in both pre- and post-viability situations even though it lacked a health exception. Whether the PBA ban will be found unconstitutional *as applied* to specific fact patterns remains to be seen. But *Gonzales* is notable for treating an abortion case with usual rules of jurisprudence instead of treating abortion as a "super" right and simply throwing out most efforts to restrict it.

Quixote tilting at windmills. No one would read his literature, attend his "rallies," or donate to the cause. The Prohibition issue is dead in social discourse, except in Muslim societies. With a string of early defeats in Congress and the federal courts, the pro-life movement stood in danger that the abortion issue would also become a dead issue, from the beginning to the present.

Astute pro-life leaders have countered this by rallying pro-lifers around passing what restrictions were permissible and by working hard to get pro-life officials elected. Getting pro-life persons in public office has been especially important with respect to those in charge of nominating and confirming Supreme Court justices, i.e., the President and the Senate. The hope that, by political efforts over the long term, there might emerge a majority on the Supreme Court willing to overrule *Roe* has been a powerful motivator for pro-life political activism. To be sure, it has been frustratingly slow due to political reversals and to the unpredictability of justices once they are secure in their lifetime appointments and subject to the allure of being lionized for "growing in office" by the Washington cocktail circuit and media establishment (e.g., Linda Greenhouse of the *New York Times*). All along, there has been the constant need to beat back pro-abortion legislation, at which NRLC has been masterful (and gained the well-deserved reputation of being one of the most effective lobbying groups in the nation).

A vital battle stratagem is to choose proper terrain—favorable to you, unfavorable to your foe. To change the hearts and minds of the public on abortion, it is necessary for pro-lifers to frame the debate to their advantage. Pro-life leaders have wisely focused on this strategy. The debate over partial-birth abortion has furthered this strategy because it has forced the pro-abortion camp to publicly defend a particularly visible and gruesome practice. Normally pro-abortion New York Senator Moynihan showed the difficulty of the terrain for our opponents when he declared PBA to be infanticide and beyond the pale of civilization. The PBA campaign also countered the problem that, despite pro-life efforts, many people still believe that abortion only happens early in pregnancy, only happens for important reasons, and involves "products of conception." The PBA drawings set before the public showed a developed baby, capable of life outside the womb, within inches of birth, being slaughtered by a stab in the skull and the suctioning of its brains. People were shocked out of their lethargy and flawed beliefs. The PBA debate resulted in significant positive changes in public attitudes that have been measured by polls.

By contrast, 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, fetal deformity, and harm to the mother. While restricting abortion in these situations is morally defensible, public opinion polls show that popular support for the pro-life side drops off dramatically when these "hard" cases are the topic. And while most pro-lifers believe that a consistent pro-life position requires permitting abortion in only the rare circumstances where it is necessary to save the life of the mother, some pro-lifers believe that there should not even be an exception to preserve the life of the mother. Other pro-lifers advocate exceptions for rape or incest. This is an important debate to have, and we should be ready to convince the public of the need for few, if any, exceptions to laws prohibiting abortion when such laws can be upheld.

However, since that is currently not the case, such a debate is premature and would undermine public support for the pro-life position.

Thus, in the current environment, the public debate should be framed so that our opponents have to defend on their "hardest" terrain, exposing them as unreasonable and outrageous and revealing the true nature of the Court's right to abortion. That has been the genius of the vigorous effort to inform the public about PBA and to enact legislation that would result in court battles, which all the while keeps the abortion issue in the public mind in a posture most unfavorable to the pro-abortionists and favorable to us. The PBA effort has been about making a difference, not just a statement. Those who object that the PBA ban leaves in place other means of abortion misunderstand or ignore the strategy and the profoundly favorable change in social attitudes wrought by the effort.

Efforts to educate, legislate, and litigate not only keep the abortion issue alive and change hearts and minds for long-term benefit, but they also translate into more disfavor for all abortions, which in turn reduces abortions. This is also true of such other "incremental" efforts as clinic regulations (which often shut down clinics), parental involvement, waiting periods, and informed consent.

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.

Those with an absolutist view even see the recent victory in having the federal PBA ban upheld (which established the important principle that there are limits to the abortion right, which has been largely treated by the Supreme Court as a "super" right without the usual limits based on compelling state interests) as a defeat. And some have shamelessly vilified the Supreme Court justices who gave us this important victory (erroneously claiming that these justices endorsed other forms of abortion) and excoriated those pro-lifers whose efforts lead to this pro-life victory. This is a grave injustice to these justices and to pro-life advocates.

Eschewing incremental efforts to limit abortion where legally and politically possible makes the error of not saving some because not all can be saved. It also makes the strategic error of believing that the pro-life issue can be kept alive without such incremental efforts. The lessons of history, such as William Wilberforce's efforts to end slavery, teach that we must do what we can until the day when we can do more, and doing the lesser implies no capitulation on the greater.

One unfortunate aspect of this internal debate is the inclination of some absolutist individuals and groups to spiritualize the debate over the best strategy for long-term protection of the unborn by calling on leaders who take an incremental approach to repent for their alleged deception of the public and abandonment of the unborn. This poses a serious threat to the

cohesion necessary for the long-term success of any movement. Responsible pro-life leaders and organizations should remain open to well-reasoned, civil, strategy debate. The pro-life movement requires passion, to be sure, but it must be tempered by wisdom, judgment, and charity. The babies deserve no less.

The Georgia Human Life Amendment

At present, there is an effort to pass a **Georgia Human Life Amendment**. The proposed language is quite similar to the first two sections of the 1981 NRLC Amendment, as evidenced by the following quotation of the proposal showing additions in *italics* and deletions in ~~strikeout~~:

> SECTION 1: *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.
>
> SECTION 2: With respect to the *fundamental and inalienable* right*s* ~~to life guaranteed to persons by the fifth and fourteenth articles of amendment to the Constitution~~ *guaranteed in this Article*, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization.

In addition to the slight modifications shown here to the first two sections of the1981 NRLC Amendment, the proposed Geogia Human Life Amendment omits the last two sections, Section 3 of which forbade any person from depriving another of life.[3]

While the NRLC Amendment, if enacted as a constitutional amendment, would have successfully restored legal protection to unborn children, the proposed Geogia Human Life Amendment will not. As noted above, so 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*

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[3]The NRLC Amendment added the following two sections:

> SECTION 3: No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall be prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring as long as such law requires every reasonable effort be made to preserve the life of each.
>
> SECTION 4: Congress and the several States shall have power to enforce this article by appropriate legislation.

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. However, if 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.

In addition, if Georgia (or any state) enacts a *prohibition* on abortion, and the Georgia personhood amendment is a prohibition, by implication it repeals its *regulations* on abortion. So when the inevitable striking down of the prohibition occurs, the state will have to reenact the currently permissible regulations of abortion. Thus, significant damage would be done to the legal protections for the unborn in that state..

Even if it were not promptly struck down, the Georgia Human Life Amendment should not be viewed as an *effective* prohibition on abortion. Constitutional provisions like this provide limits on the *state*, not *individuals*. So, for example, the federal First Amendment protects you from federal government censorship of your speech, not the actions of your boss who fires you for saying things disagreeable to her. Unless the abortionist is acting on behalf of the state (few if any would qualify), then he is not prohibited by the "personhood" amendment. Before the amendment would become applicable to abortionists, it would require the legislature to enact a law banning abortion. There is no way to predict the required scope of protections that laws must provide under the personhood amendment.

Helpful Legal Changes

While bans on the core abortion right at the state level are currently both useless and potentially dangerous, there are many helpful things that states can do to improve the legal situation in their state. Several pro-life groups, especially the National Right to Life Committee, have model bills that are the result of much thought and experience. Such well-conceived laws will reduce or eliminate the likelihood of litigation and possible losses that will require the state to pay attorneys fees for pro-abortion lawyers. Here are some examples.

- A constitutional amendment to (1) state a pro-life public policy and (2) eliminate the state constitution as a basis for a state court to declare a state right to abortion, along the following lines: "SECTION 1. The policy of the State of X is to protect the life of every unborn child from conception until birth, to the extent permitted by the federal constitution. SECTION 2. Nothing in this constitution shall be construed to grant or secure any right relating to abortion or the public funding thereof."
- A statute banning partial-birth abortion.
- A statute including unborn victims in homicide laws.

- A statute protecting infants born alive as a result of attempted abortion.
- A statute banning human cloning and embryonic stem cell research.
- A statute requiring parental involvement for minors seeking abortion.
- A statute requiring true informed consent for women seeking abortion, with state-prescribed content and a waiting period after receipt of the information.
- A statute providing protection for pro-life health care providers and pharmacists who refuse to participate in abortion-related activity.
- A statute requiring that abortion clinics meet certain standards, such as those required for other ambulatory surgical care facilities in the state.
- A statute patterned after the proposed Unborn Child Pain Awareness Act.
- A statute informing the woman seeking an abortion that the unborn will experience pain.
- A statute requiring the woman to view ultrasound images of her unborn baby.

Some Responses to Georgia Human Life Amendment Coalition Statements

In Georgia, a Human Life Amendment Coalition has been formed to promote passage of the Georgia Human Life Amendment discussed above, with information posted at www.personhood.net. A quotation from Richard Thompson, president and chief counsel of the Thomas More Center is prominently featured on the website:

> The Human Life Amendment provides Georgia with the best legal means of overturning the central holding of Roe v Wade. At the very least, it insures that Georgia immediately becomes a pro-life state the moment the shackles of Roe are broken. For too long the pro-life movement has been dominated by a strategy of "wait"—too fearful of losing to risk winning. The adoption of this amendment will place Georgia at the forefront of the battle to restore the sanctity of innocent human life. I applaud Georgia's pro-life citizens and their elected representatives for having the courage of their convictions.

As addressed above, the proposed HLA has serious flaws and is not a wise use of pro-life resources at this time. This section of the current memorandum addresses some specific representations and arguments made by the Coalition at www.personhood.net.

Implied Bopp Endorsement. The home page at www.personhood.net includes the following statement and link: "Click here for a comprehensive scholarly article that articulates the foundational constitutional and jurisprudential justifications that clearly explain why constitutional personhood MUST include unborn human beings in accordance with the rule of law." The link leads to an interesting article published in *Issues in Law & Medicine* (Vol. 22,

Nos. 2& 3, Fall 2006/Spring 2007) a peer-reviewed journal of which James Bopp, Jr. is the Editor-in-Chief. The article, by Dr. Charles I. Lugosi, is entitled "Conforming to the Rule of Law: When Personhood and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence." In the Preface to this journal issue, Jim Bopp introduced the article with a description of its contents, which is likely the source of the mistaken belief expressed by some that Jim Bopp endorses the Georgia Human Life Amendment.

The Preface is a usual way of introducing and describing articles published in the journal and, as is true with scholarly journals, does not mean that the editors necessarily agree with everything said in the article. More importantly, while the Lugosi article argues that the Fourteenth Amendment should be interpreted to include the unborn as persons, that in no way means that now is the time to pass a *state* personhood amendment. While a properly worded and applied *federal* personhood amendment would provide protection for the unborn, a *state* amendment will promptly be struck down, given the current state of the law.

Even if a state personhood amendment could be effective, it would be necessary for it to include within its own text the proper application of the personhood declaration, instead of leaving interpretation to the whims of the courts. The 1981 NRLC Amendment expressly did this in Section 3 (which the Georgian amendment wholly lacks), stating that:

> No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring as long as such law requires every reasonable effort be made to preserve the life of each.

Simply declaring that the unborn are persons, without saying what that means in application, leaves the courts wide open to impose their own interpretations on any new personhood amendment—which is a dangerous proposition, as proven by our experience with *Roe v. Wade.* As Bopp said in his Preface (emphasis added) describing the contents of the Lugosi article, "[t]he Fourteenth Amendment, *properly interpreted and applied* to unborn human beings, would prohibit abortion in every state." Proper interpretation and application of a personhood amendment—even in a *federal* amendment where it would actually have some effect—must not be left to the courts, as the Georgia Human Life Amendment does.

"Responses to Common Objections." At the www.personhood.net website, there is a link to a page entitled "Responses to Common Objections." This list of "common objections" and responses is organized under three categories: (1) "Privacy & Reproductive Rights Issues," (2) "'It Won't Work' Arguments," and (3) "Miscellaneous Objections." The previous discussion answers in broad terms all of the HLA Coalition's responses, which ignore the fundamental flaws of the Georgia HLA identified herein. Here are some further big-picture responses to the arguments made on the website.

The categories about "Privacy & Reproductive Rights Issues" and "Miscellaneous Objections" deal with a range of possible unintended consequences of establishing the unborn as persons, such as enforcement of homicide laws against pregnant women, restricting the activities of pregnant women, outlawing contraception, and so on. Without getting into the merits of each point, the big picture is that the HLA creates uncertainty in the law, leaving it up to future legislatures to establish implementing laws and up to enforcement officials and courts to sort out what the law might mean in various applications. A better approach is to eliminate that uncertainty by passing specific legislation that does exactly what needs to be done.

The category about "'It Won't Work' Arguments" acknowledges that the purpose of the HLA would be to provide "a direct challenge to the fundamental holding in *Roe v. Wade*" and that it will "likely" be challenged on constitutional grounds, but insists that "there is **no** basis for claiming with absolute certainty that the Supreme Court would not review the case" and extols the HLA as an opportunity to challenge *Roe*. However, it completely ignores the current constituency of the Court. Losing is not cost-free, as the proponents of this approach suggest. 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.