

A TEXTUAL ANALYSIS OF THE POSSIBLE IMPACT OF MEASURE 26 ON THE MISSISSIPPI BILL OF RIGHTS

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INTRODUCTION

On November 8, Mississippi voters will decide whether to adopt Measure 26, an initiative which proposes to clarify the scope of “person” and “persons” *as those terms are used in the Mississippi Bill of Rights*: “As used in this Article III of the state constitution, [t]he term ‘person’ or ‘persons’ shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof.”¹ Measure 26 does not, however, define “person” as it appears in statutes; it does not affect Mississippi Code Section 1-3-39, for instance, which defines “person” in the rest of the Mississippi Code, nor the provisions of criminal law in Chapter 3 of Title 97 (“Offenses Against the Person”).²

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¹ See Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), *available at* <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.

² Some of the confusion about the exact scope and significance of Measure 26 may be a result of its ballot title: “Should the term ‘person’ be defined to include every human being from the moment of fertilization, cloning or the equivalent thereof?” *Id.* It would have been much clearer if “in the Bill of Rights” were part of the ballot summary. It is possible, of course, that the Mississippi Supreme Court might use Measure 26 as a reason to interpret “person” in the Mississippi Code analogously. The court could, however, also draw a *negative* inference under the *expressio unius est exclusio alterius* canon. It would be up to the court to decide which inference, if any, would best fit the context of a particular statute. Further, Measure 26-based statutory interpretations could be corrected by the legislature. Also, because the present definition of “person” in Mississippi Code Section 1-3-39 does not require that personhood begin *later* than fertilization, a personhood-begins-at-fertilization position would be available to the Mississippi Supreme Court even without Measure 26. MISS. CODE ANN. § 1-3-39 (2005); *cf. infra* notes 39 to 41 and accompanying text (current

It is important to distinguish, of course, the *hopes* and *goals* of Measure 26's backers, on the one hand, from the meaning actually expressed in the initiative's text, on the other.³ This Article will focus on the effect of Measure 26 on the meaning expressed in language of the Bill of Rights, specifically on how the constitutional language composing the Mississippi Bill of Rights uses the words "person" and "persons." It will focus on the way in which the text of Measure 26 will interact with the text of the Bill of Rights, rather than assessing in detail the purpose of Measure 26, the applications of Measure 26 expected by its framers, the possible effect of Measure 26 on Mississippi constitutional doctrine as developed by the Mississippi Supreme Court, the way in which courts might infer public policy from Measure 26, or the way in which Measure 26 might interact with the policy concerns promoted by other areas of law.⁴ Constitutional text is not everything for constitutional law, of course, but it is always the starting point, and is especially important when voters are considering adding particular language to a constitution. The vehicle of constitutional change being considered on November 8 is a particular piece of language. If we do not understand the specific usages of "person" and "persons" to which Measure 26 applies, we cannot hope to assess the proposal properly.⁵

uncertainty about "person" in wrongful-death statute, explicitly leaving a personhood-begins-at-fertilization position open).

³ For much more on this distinction, see Christopher R. Green, "*This Constitution*": *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1619-21 (2009) (sketch of those who make purposes primary); *id.* at 1624-28 (sketch of a text-focused view); *id.* at 1648-56 (explaining why to prefer a form of textualism over purpose-based interpretation).

⁴ These concerns run the gamut of possible modalities of constitutional argument. For the classic analysis of such modes, see PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1984) (discussing textual, historical, doctrinal, structural, prudential, and ethical arguments). For a related analysis placing textual argument at the top of a constitutional-interpretive hierarchy, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (ranking modes by text, framers' intent, constitutional theory, precedent, and value arguments). For my brand of textualism, see Green, *supra* note 3.

⁵ While this textual analysis distinguishes the direct textual effect of Measure 26 on the Mississippi Constitution from the possible secondary effect on constitutional doctrines, statutory interpretation, or the common law, I do not mean to suggest that Measure 26 is not self-executing in the way, for instance, that *Medellin v. Texas*, 552 U.S. 491, 504-19 (2008), held that decisions of the International Court of Justice are not self-executing, or in which *Oktibbeha Cnty. Bd. of Educ. v. Sturgis*, 531 So. 2d 585,

It is obvious that the *ultimate aim* of proponents of Measure 26—at least the most prominent of them—is to “stop abortion.” Here, for instance, is one of the banners on the “Yes on 26” web site:⁶



Because, however, no provision in the Mississippi Constitution explicitly requires the state to prevent harm to “persons,” there is no straightforward *textual* path from a clarification of “person” in the Bill of Rights to a prohibition on abortion.⁷ Whatever its backers may hope or its critics fear, the text of Measure 26 is thus not a frontal assault on *Roe v. Wade*,⁸ let alone a direct threat to IVF,⁹ a ban on birth control that

588 (Miss. 1988), held that the 1944 amendment of Section 211 of the Mississippi Constitution was not self-executing. Sections 14 and 24 each “grant[] a distinct right,” *id.* at 588, and amendments affecting them are, thus, plainly self-executing under *Oktibbeha*. The main issue I address, though, is what exactly that “distinct right” encompasses, as a textual matter. On its own, Measure 26 might not prohibit abortion, but because the requisite addition would come from the Mississippi Supreme Court, not the legislature, it still counts as self-executing in the *Medellin-Oktibbeha* sense.

⁶ See VOTE FOR LIFE; YESON26.NET, <http://yeson26.net/> (last visited Nov. 2, 2011).

⁷ In saying that there is no straightforward textual path from a clarification of “person” in the Bill of Rights to a prohibition on abortion and that the text of Measure 26 is not a frontal assault on *Roe*, I mean that Measure 26 does not, *in terms*, in its very language, do something that *Roe* forbids. Measure 26 may, however, as explained below, be the occasion for a conflict with *Roe* when combined with other possible elements of constitutional law, such as a duty to protect or an antidiscrimination requirement that might be read into the due process clause of Section 14.

⁸ 410 U.S. 113 (1973).

⁹ See Jonathan Will, *Op-Ed: Life and Law—The Commitment to Pre-Embryonic Personhood*, MISS. BUS. J., September 23, 2011, <http://msbusiness.com/2011/09/op-ed-life-and-law-%E2%80%94the-commitment-to-pre-embryonic-personhood/> (“If we are committed to pre-embryonic personhood, we should be committed to banning IVF and other similarly risky fertility treatments until such technologies are safe for all persons (including pre-embryos) involved.”).

prevents implantation rather than fertilization,¹⁰ or a requirement to investigate miscarriages.¹¹

Without some sort of constitutional duty to protect or constitutional duty not to exclude embryos and fetuses from protection, Measure 26's main results would be relatively modest: an expansion of tort remedies for injuries suffered by fetal and embryonic plaintiffs under Section 24 and a ban on *governmental* action that would deprive embryos and fetuses of life under Section 14. *If* the Mississippi Supreme Court were to interpret the Section 14 due process requirement to include a duty to protect or a ban on discrimination in the supply of protection, then Measure 26 might produce more dramatic results. These results, however, would go no further than the Mississippi Supreme Court requires them to go. Any state-constitutional rule that might then conflict with *Roe* and its progeny would, of course, only survive if the U.S. Supreme Court were to change its mind and overrule *Roe*.¹² Such a challenge to current federal law, however, would not be required by Measure 26 on its own.

I. "PERSON" IN THE TEXT OF THE MISSISSIPPI BILL OF RIGHTS

Canvassing the immediate textual impact of Measure 26 requires, not a full tour of the Mississippi Code, but only the state constitution's Bill of Rights. Article 3 of the Mississippi Constitution contains twenty-eight sections, running from Section 5 to Section 32.¹³ Of the twenty-eight sections, just twelve contain

¹⁰ *Id.* ("To be consistent, we would need to be committed to outlawing any form of birth control that has efficacy after fertilization occurs . . .").

¹¹ *Id.* ("A commitment to pre-embryonic personhood would require us to investigate these miscarriages to ensure that no foul play was involved in the loss of these persons. This does not necessarily mean that all women experiencing miscarriages would be prosecuted; however, our legal framework requires an investigation when there has been a loss of life.")

¹² *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

¹³ MISS. CONST. art. III, §§ 5-32. The Mississippi Constitution of 1890 is divided into fifteen articles, but its section numbers run consecutively from Section 1 to Section 273. Because of amendments since 1890, not all section numbers are still used, and some sections have A or B suffixes. Within the Bill of Rights, Section 19, banning dueling, was repealed in 1987, and Section 26A, providing for victims' rights in

either “person” or “persons”—Sections 8,¹⁴ 10,¹⁵ 12,¹⁶ 14,¹⁷ 20,¹⁸ 22,¹⁹ 23 (two uses),²⁰ 24 (two uses),²¹ 25,²² 26,²³ 27,²⁴ and 29 (11 uses).²⁵ These sections have a total of nineteen singular uses of

criminal procedure, was added in 1998, leaving the total number of sections in Article 3 at 28.

¹⁴ MISS. CONST. art. III, § 8 (“All *persons* resident in this State, citizens of the United States, are hereby declared citizens of the State of Mississippi.” (emphasis added)).

¹⁵ MISS. CONST. art. III, § 10 (“No *person* shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” (emphasis added)).

¹⁶ MISS. CONST. art. III, § 12 (“The right of every citizen to keep and bear arms in defense of his home, *person* or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.” (emphasis added)).

¹⁷ MISS. CONST. art. III, § 14 (“No *person* shall be deprived of life, liberty or property, except by due process of law.” (emphasis added)).

¹⁸ MISS. CONST. art. III, § 20 (“No *person* shall be elected or appointed to office in this State for life or during good behavior, but the term of all offices shall be for some specified period.” (emphasis added)).

¹⁹ MISS. CONST. art. III, § 22 (“No *person’s* life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.” (emphasis added)).

²⁰ MISS. CONST. art. III, § 23 (“The people shall be secure in their *persons*, houses and possessions, from unreasonable seizure or search, and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the *person* or thing to be seized.” (emphasis added)).

²¹ MISS. CONST. art. III, § 24 (“All courts shall be open; and every *person* for an injury done him in his lands, goods, *person* or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay.” (emphasis added)).

²² MISS. CONST. art. III, § 25 (“No *person* shall be debarred from prosecuting or defending any civil cause, for or against him or herself before any tribunal in this State, by him or herself, or counsel, or both.” (emphasis added)).

²³ MISS. CONST. art. III, § 26 (“[I]n prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all *persons* except such as are necessary in the conduct of the trial.” (emphasis added)).

²⁴ MISS. CONST. art. III, § 27 (“No *person* shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment” (emphasis added)).

²⁵ MISS. CONST. art. III, § 29(1) (“[A]ll *persons* shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the *person* previously has been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.” (emphasis added)); § 29(2) (“If a *person* charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year

“person” and five plural uses of “persons.” Of these twenty-four uses, three use “person” or “persons” to refer to the body.²⁶ Of the remaining twenty-one uses of “person” or “persons” to refer to individuals, one refers to persons holding office,²⁷ one to persons who are citizens of the United States,²⁸ and fifteen to persons involved in criminal or civil litigation, either as criminal defendants, civil litigants, or observers at a trial.²⁹ In none of

or more in the penitentiary or any other state correctional facility is granted bail and (a) if that *person* is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the *person* has committed a felony while on bail, then the court shall revoke bail and shall order that the *person* be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term “felony” means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection.” (emphasis added); § 29(3) (“In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the *person* or persons arrested for such offenses would constitute a special danger to any other *person* or to the community or that no condition or combination of conditions will reasonably assure the appearance of the *person* as required.” (emphasis added)); § 29(4) (“Any *person* who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court.” (emphasis added)).

²⁶ See MISS. CONST. art. III, § 12 (“defense of his . . . *person*” (emphasis added)); § 23 (“secure in their *persons*” (emphasis added)); § 24 (“an injury done him in his . . . *person*” (emphasis added)). These three instances define “person” as the body of a human being. The remaining twenty-one uses define “person” as human or individual.

²⁷ See MISS. CONST. art. III, § 20 (“No *person* shall be elected or appointed to office in this State for life or during good behavior, but the term of all offices shall be for some specified period.” emphasis added)).

²⁸ MISS. CONST. art. III, § 8 (“All *persons* resident in this state, citizens of the United States, are hereby declared citizens of the state of Mississippi.” (emphasis added)). Under the federal Fourteenth Amendment, of course, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. If the Fourteenth Amendment is a full definition of U.S. citizenship, then one must be born to be a U.S. citizen. One might, however, read the Fourteenth Amendment merely to state a minimum condition on U.S. citizenship, not a full definition, in which case it would be possible in theory for the unborn to be U.S. citizens as well, and in which case Section 8 would make them citizens of Mississippi. Nothing seems to follow from that designation, however.

²⁹ See MISS. CONST. art. III, §§ 10 (treason), 22 (double jeopardy), 25 (self-representation), 26 (witnesses at trial), 27 (grand juries), 29 (bail, 10 uses).

these contexts would Measure 26 make any difference. That leaves four uses. Measure 26 could affect two of them in rare cases—the Fourth Amendment analogue, Section 23, requires specificity in describing “the person . . . to be seized,”³⁰ which might include an embryo or perhaps a fetus, and Section 29(3) refers to the denial of bail to defendants who are “a special danger to any other person.”³¹ That leaves two sections with a more significant potential textual impact, Sections 14 and 24.

II. FETAL AND EMBRYONIC PLAINTIFFS’ RIGHTS

Turning to the less significant possible textual impact on the Bill of Rights first, Section 24 reads, “All courts shall be open; and every *person* for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay.”³² Measure 26 as applied to Section 24 would thus allow, for instance, wrongful death actions for the death of an embryo or fetus.

Tort rights for the unborn were discussed in *Roe v. Wade* itself in 1973³³ and in *Webster v. Reproductive Health Services* in 1989.³⁴ *Webster* offers an instructive parallel to Measure 26, though it does not use the term “person.” A Missouri provision reads:

1. The general assembly of this state finds that:

³⁰ MISS. CONST. art. III, § 23.

³¹ MISS. CONST. art. III, § 29(3).

³² MISS. CONST. art. III, § 24. The Mississippi Supreme Court is currently considering a certified question from the Fifth Circuit on the constitutionality of damage caps under Section 24 as well as other provisions. *See Learmonth v. Sears, Roebuck & Co.*, 631 F.3d 724 (5th Cir. 2011) (certifying question); *see also* *Double-Quick, Inc. v. Lymas*, 50 So. 3d 292 (Miss. 2010) (avoiding issue because liability was reversed); *InTown Lessee Assocs. v. Howard*, 67 So. 3d 711 (Miss. 2011) (avoiding issue because jury never distinguished economic from non-economic damages). The Mississippi Supreme Court recently asked for briefing in *Sears v. Learmonth* on whether the *InTown* rule would undermine the application of damage caps after a stipulation in federal court. *See* Order, *Sears Roebuck & Co. v. Learmonth*, No. 2011-FC-00143-SCT (Miss. 2011).

³³ 410 U.S. 113, 161-62 (1973) (noting that many states give tort and probate rights to fetuses).

³⁴ 492 U.S. 490, 506 (1989).

- (1) The life of each human being begins at conception;
- (2) Unborn children have protectable interests in life, health, and well-being;
- (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term “unborn children” or “unborn child” shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.³⁵

The Supreme Court, with Justices O’Connor and Kennedy joining the opinion,³⁶ found no conflict between this provision and *Roe*, absent construction from the Missouri Supreme Court of what the “rights, privileges, and immunities available to other persons, citizens, and residents of this state” were.³⁷ “State law has offered protections to unborn children in tort and probate law [the Court here cites *Roe*] and § 1.205.2 can be interpreted to do no more than that.”³⁸

³⁵ MO. REV. STAT. § 1.205 (1999).

³⁶ Three years later, of course, they both voted to retain *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Webster*, however, is still good law.

³⁷ MO. REV. STAT. § 1.205 (1999); *Webster*, 492 U.S. at 506.

³⁸ *Webster*, 492 U.S. at 506. The Court rejected a claim very similar to one made against Measure 26: “Appellees . . . [M]aintain, for example, that the preamble’s definition of life may prevent physicians in public hospitals from dispensing certain forms of contraceptives, such as the intrauterine device.” *Id.* at 505-06 (internal citation omitted).

Mississippi tort law is currently unsettled on remedies given for injuries to embryos and fetuses. In 2003, the Mississippi Supreme Court in *66 Federal Credit Union v. Tucker*³⁹ considered the application of the wrongful death statute, Mississippi Code Section 11-7-13, to embryos and fetuses. The court expressly left open whether Justice Cobb's concurrence, which would have allowed tort recoveries from the "moment . . . when a separate life begins at conception,"⁴⁰ was correct.⁴¹ Measure 26 would, of course, not amend Section 11-7-13 directly, but the plaintiffs' rights requirement of Section 24 of the constitution would, under Measure 26, require that embryos and fetuses and their survivors receive the same tort remedies as others. *Roe* and *Webster*, however, allow such a result.

III. *DESHANEY*, THE DUTY TO PROTECT, AND SECTION 14

That leaves, finally, Section 14: "No *person* shall be deprived of life, liberty or property, except by due process of law."⁴² Assessing the textual impact of Measure 26 on Section 14 raises an important issue related to the section's use of passive voice: who must do the depriving to be covered by the provision? At a minimum, Measure 26 would, under Section 14, obviously require the *government* to refrain from harming embryos and fetuses without due process of law. Given the current lack of governmental funding in Mississippi for abortion, embryo-destructive research, or other activities that might deprive embryos or fetuses of life, however, it is hard to see how such a context could arise, outside very unusual contexts like a pregnant death-row inmate.

In *DeShaney v. Winnebago County*, the U.S. Supreme Court held in 1989 that the federal Due Process Clause of the

³⁹ 853 So. 2d 104 (Miss. 2003).

⁴⁰ *Id.* at 115 (Cobb, J., concurring).

⁴¹ *Id.* at 112 (majority opinion) (noting that Justice Cobb's concurrence "has merit," but "we leave that question to another day where the appropriate, specific facts and circumstances properly raising the question of whether to apply the concept of 'life commencing at the moment of conception' for an unborn as being applicable for a claim under the wrongful death statute"). Section 11-7-13 of the Mississippi Code has since been amended to change "person" to "person or any unborn quick child," but the uncertainty remains. MISS. CODE ANN. § 11-7-13 (2004).

⁴² MISS. CONST. art. III, § 14.

Fourteenth Amendment did not require the state to protect children against abuse.⁴³ The Court in *DeShaney* held, “[T]he harm was inflicted not by the State of Wisconsin, but by Joshua’s father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.”⁴⁴ Such passive behavior, the Court held, does not violate the Due Process Clause of the Fourteenth Amendment.

Would the Mississippi Supreme Court follow *DeShaney* in interpreting Section 14 of the state constitution, or would it instead understand Section 14 to impose a duty to protect? There are two reasons to think that it would follow *DeShaney*.

First, *Westbrook v. City of Jackson* held in 1995 that there was no constitutional property right in fire protection, relying upon *DeShaney*.⁴⁵ The discussion is not elaborate, and the direct issue of protection from private violence was not before the court, but the court quotes and follows *DeShaney* without suggesting disagreement.⁴⁶

Second, a large number of other state courts interpreting their state constitutions have interpreted them in line with *DeShaney*, either without a suggestion that the state constitution would be different⁴⁷ or explicitly rejecting the idea.⁴⁸ It is true

⁴³ 489 U.S. 189,189 (1989).

⁴⁴ *Id.* at 203. The Court, thus, impliedly disagreed with this statement from *Roe*: “If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.” 410 U.S. at 156-57. This statement is quoted in the argument on behalf of Measure 26 in the secretary of state’s official brochure. See BRAD PREWITT, INITIATIVE #26: DEFINITION OF ‘PERSON’ PRO ARGUMENT, available at http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition_of_Person-PW_Revised.pdf. In fairness to Justice Blackmun, he dissented in *DeShaney*. See *DeShaney*, 489 U.S. at 212-13 (Blackmun, J., dissenting) (“Poor Joshua!”).

⁴⁵ 665 So. 2d 833, 838-39 (Miss. 1995).

⁴⁶ One reason to be skeptical of *Westbrook*, however, is that it discusses “state equal protection rights,” *id.* at 839, but the Mississippi Constitution actually has no equal protection clause. However, this language might be taken to refer to the due process clause, which some state courts have read to incorporate equal-protection-like principles. See *infra* note 57.

⁴⁷ See *Wright v. Bailey*, 611 So. 2d 300 (Ala. 1992); *Badia v. City of Casa Grande*, 988 P.2d 134 (Ariz. Ct. App. 1999); *Repling v. Lokey*, 2010 Ark. 356 (Ark. 2010); *Jenkins v. Orange Cnty.*, 212 Cal. App. 3d 278 (Cal. Ct. App. 1989); *Henderson v. Gunther*, 931 P.2d 1150 (Colo. 1997); *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. Dist. Ct. App. 1998); *King v. Pioneer Reg’l Educ. Serv. Agency*, 688 S.E.2d 7 (Ga. Ct. App.

that a few courts have left the issue open,⁴⁹ and some commentators favor disagreement with *DeShaney* on state-constitutional grounds.⁵⁰ However, while the Mississippi Supreme Court has sometimes shown a willingness to swim against the state-constitutional tide,⁵¹ other things being equal one would still expect the court to do what other state courts have done.

If, though, the Mississippi Supreme Court were to overrule or limit *Westbrook* and interpret the Mississippi Constitution to impose a duty to protect, what would be the result? Of course, any rule conflicting with *Roe v. Wade* or later cases would only stand if those federal cases were overruled. But it is also important to remember that Measure 26 does not itself dictate the exact scope of any duty to protect. The same arguments now lodged against the adoption of Measure 26 could thus be made to the Mississippi Supreme Court in order to persuade it either not to adopt a duty-

2009); *Minks v. Pina*, 709 N.E.2d 379 (Ind. Ct. App. 1999); *Allen v. Anderson*, 490 N.W.2d 848 (Iowa Ct. App. 1992); *Schmidt v. HTG, Inc.*, 961 P.2d 677 (Kan. 1998); *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky. Ct. App. 1992); *Arledge v. Sherrill*, 738 So. 2d 1215 (La. Ct. App. 1999); *Moore v. City of Lewiston*, 596 A.2d 612 (Me. 1991); *Dean v. Childs*, 684 N.W.2d 894 (Mich. App. 2004); *Zamfir v. Minneapolis Police Dept.*, No. 62-CV-09-8159, 2010 WL 4053263 (Minn. Dist. Ct. Aug. 17, 2010); *Brummitt v. Springer*, 918 S.W.2d 909 (Mo. Ct. App. 1996); *Nelson v. Driscoll*, 983 P.2d 972 (Mont. 1999); *Claypool v. Hubbard*, 626 N.W.2d 539 (Neb. 2001); *Strumph v. Ventura*, 849 A.2d 1095 (N.J. Super. 2004); *Mark G. v. Sabol*, 695 N.Y.S.2d 730 (N.Y. 1999); *Lewis v. Office of Prosec. Att’y of Columbiana Cnty.*, No. 05-CO-69, 2006 WL 2590561 (Ohio Ct. App. Sept. 5, 2006); *M.R. v. Cox*, 881 P.2d 108 (Okla. Ct. App. 1994); *Park v. Assoc. Marine Insts., Inc.*, 608 S.E.2d 134 (S.C. Ct. App. 2004); *Purdy v. Fleming*, 655 N.W.2d 424 (S.D. 2002); *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995); *Billado v. Appel*, 687 A.2d 84 (Vt. 1996); *Marshall v. Winston*, 389 S.E.2d 902 (Va. 1990); *In re Adoption of Infant Boy Crews*, 803 P.2d 24 (Wa. 1991); *Kara B. v. Dane Cnty.*, 555 N.W.2d 630 (Wis. 1996).

⁴⁸ See *Jordan v. Randolph Cnty. Pub. Schs.*, No. 4:08-CV-131, 2009 WL 1410082 (M.D. Ga. May 19, 2009); *Tilden v. Hayward*, CIV. A. No. 11297, 1990 WL 131162 (Del. Ch. Sept. 10, 1990); *Lewis v. Spagnolo*, 710 N.E.2d 798 (Ill. 1999); *Wells v. State*, 642 A.2d 879 (Md. Ct. Sp. App. 1994); *Robbins v. Cumberland Cnty. Children and Youth Servs.*, 802 A.2d 1239 (Pa. Commw. Ct. 2002); *Hatfield v. Rochelle Coal Co.*, 813 P.2d 1308 (Wyo. 1991).

⁴⁹ *Aselton v. Town of East Hartford*, 890 A.2d 1250 (Conn. 2006); *In re McKnight*, 550 N.E.2d 856 (Mass. 1990); *Cal. First Bank v. State*, 801 P.2d 646 (N.M. 1990).

⁵⁰ See, e.g., Helen Gugel, *Remaking the Mold: Pursuing Failure-To-Protect Claims Under State Constitutions Via Analogous Bivens Actions*, 110 COLUM. L. REV. 1294 (2010).

⁵¹ See, e.g., *Knight v. State ex rel. Moore*, 574 So. 2d 662, 668 (Miss. 1990) (displaying unconcern about “weight of authority” in deciding that bingo is not a lottery).

to-protect reading of Section 14 or to persuade it to limit that duty in one way or another.

It is also useful to note two obvious limits to any duty to protect.⁵²

First, the self-defense and defense-of-others principles currently codified in Mississippi Code Section 97-3-15 are perfectly consistent with the personhood of the aggressor or even with a general duty to protect all persons.⁵³ A burglar is a person, but deadly force may be used against him if he threatens others. Likewise, even if there were a constitutional duty to protect embryos and fetuses, such a duty would in any case not require the state to ban medical care that saves lives—for instance, by treating ectopic pregnancies.⁵⁴

Second, the mere fact that a product *could* be used to cause harm to others does not as a general matter require liability for those who supply the product. Sellers of baseball bats, knives, or guns are not *ipso facto* criminally or civilly liable just because their products *could* be used—or in fact, are used—to harm others.

⁵² These limits would also apply to any application of a constitutional ban on inequality in the supply of protection.

⁵³ MISS. CODE ANN. § 97-3-15 (2006).

⁵⁴ Cf. Mississippi State Medical Association, *Nov. 8 Voters Asked to Define Life at Fertilization*, http://www.msmaonline.com/Docs/MSMA%20Alerts/11_Oct_10_Proposal_26_email2.pdf (“We fear that [Measure 26] will place in jeopardy a physician who tries to save a mother’s life by performing procedures and employing techniques physicians have used for years.”) (last visited Nov. 2, 2011). It is worth pointing out that the current language in MISS. CODE ANN. § 97-3-15 (2006) does not seem to encompass defensive force directed against non-intentional action, such as the threat that an ectopic pregnancy might pose:

The killing of a human being . . . shall be justifiable . . . [w]hen committed in the lawful defense of one’s own person or any other human being, where there shall be reasonable ground to apprehend *a design to . . .* do some great personal injury, and there shall be imminent danger of *such design* being accomplished

MISS. CODE ANN. § 97-3-15(f) (2006) (emphasis added). If the Mississippi Supreme Court were to read a duty to protect or prohibition on discrimination in the supply of protection into Section 14, it would thus need to do so in a way that would accommodate a slightly broader principle of self-defense than Section 97-3-15 to cover non-intentional threats like that posed by an ectopic pregnancy. Likewise, if the legislature were to amend (perhaps under the influence of Measure 26) the exemption for abortion in the definition of “human being” in MISS. CODE ANN. § 97-3-37(3) (2006 & Supp. 2011), it would be wise for the legislature at the same time to expand Section 97-3-15(f) to cover ectopic pregnancies.

Contraception that *could* prevent implantation rather than fertilization would not be banned simply because of that possible use.

III. *DESHANEY* FOOTNOTE 3 AND A POSSIBLE ANTIDISCRIMINATION REQUIREMENT OF SECTION 14

While, as explained above, my focus in this Article is on the immediate textual impact of Measure 26, and not on possible ways it might affect constitutional doctrine outside the constitutional language itself, one other possible Section-14-related effect of Measure 26 should also be mentioned: the possibility that the Mississippi Supreme Court might follow the handful of other courts who have read equality principles into their state-constitutional due process clauses.⁵⁵ In striking down D.C. school segregation the same day as *Brown v. Board of Education*,⁵⁶ the U.S. Supreme Court likewise relied on the Fifth Amendment's Due Process Clause.⁵⁷ There are well-known problems with such an antidiscrimination reading of due process, however. It makes the Equal Protection and Due Process Clauses of the Fourteenth Amendment redundant, and requires believing that in 1791, the Fifth Amendment banned federal racial discrimination at the same time that, for instance, federal law banned anyone but white

⁵⁵ See *State Admin. Bd. of Election Laws v. Supervisors of Elections*, 679 A.2d 96, 100 n.6 (Md. 1996); *State v. Russell*, 477 N.W.2d 886, 889 n.3 (Minn. 1991); *Israel v. W. Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 486-87 (W. Va. 1989); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1018 n.26 (2003) (suggesting that Mississippi might follow such a path, but that it has not yet). As noted above, *supra* note 46, *Westbrook* briefly analyzed a claim based on "state equal protection rights" without anchoring them textually, and Section 14 would seem the most likely home. Shaman notes that only the Delaware and Mississippi state constitutions lack general antidiscrimination requirements, and Delaware courts have left the issue open. *Id.* (citing *Hughes v. State*, 653 A.2d 241, 245 n.3 (Del. 1994)). Embarrassment for our state's civil-rights record might make the Mississippi Supreme Court reluctant to hold explicitly that its state constitution lacks an antidiscrimination guarantee. There are strong textual grounds, however, for such a holding. For Alabama's struggle with the issue, see *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999) (split court assessing whether state constitution banned discrimination, which earlier cases had referred to without a textual foundation).

⁵⁶ 347 U.S. 483 (1954).

⁵⁷ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

people from becoming citizens.⁵⁸ If, though, an antidiscrimination reading of Section 14 were adopted by the Mississippi Supreme Court, the exclusion of embryos and fetuses from protection might be seen as unconstitutional discrimination, even if there is no right to protection as such. Indeed, *DeShaney* itself in its third footnote mentioned such a possibility under the federal equal protection clause: “The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. But no such argument has been made here.”⁵⁹

Textually, this sort of argument seems somewhat more difficult under a due process clause that is limited to deprivations of life, liberty, and property than with the federal equal protection clause, however. Even if the phrase “due process of law” includes only laws that apply equally to all persons,⁶⁰ the resulting antidiscrimination requirement would seem not to apply to failures to protect, but only to state deprivations of life, liberty, or property.⁶¹ Such *deprivations* might be constitutional only if they take place pursuant to a general, nondiscriminatory law, but such a requirement would fall short of banning discrimination

⁵⁸ Act of Apr. 14, 1802, ch. 28, § 1, 2 Stat. 153, 153 (“[A]ny alien, being a free white person, may be admitted to become a citizen of the United States . . . on the following conditions”); *cf.* Act of Mar. 23, 1790, ch. 3, § 1, 1 Stat. 103, 103 (“[A]ny alien, being a free white person”); Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414, 414 (“[A]ny alien, being a free white person”).

⁵⁹ *DeShaney*, 489 U.S. at 197 n.3 (internal citation omitted).

⁶⁰ For such an argument, see, for example, *Dartmouth College v. Woodward*, 17 U.S. 518, 581-82 (1819) (argument of Daniel Webster) (“Have the plaintiffs lost their franchises by ‘due course and process of law?’ On the contrary, are not these acts ‘particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws?’ By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land.”).

⁶¹ *See, e.g., Bolling*, 347 U.S. at 500 (“Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”).

generally the way the equal protection clause does. As with the interpretation of Section 14 to impose a duty to protect, of course, the interpretation of Section 14 to ban discrimination would be in the hands of the Mississippi Supreme Court, and not required by Measure 26 itself.

CONCLUSION

Backers of Measure 26 have claimed it would by itself require the state to protect human embryos and fetuses from the moment of fertilization, while opponents have argued that it would impose liability for life-saving medicine, ban forms of birth control, or require criminal investigations of miscarriages. As Mississippi Constitution is currently understood by courts, however, these claims lack a straightforward textual explanation. The text of Measure 26 is not a frontal assault on *Roe*. Measure 26 would offer enhanced tort remedies under Section 24 when embryos and fetuses are injured and would prevent state action harming embryos and fetuses under Section 14. More significant effects than these, however, would depend on a state-constitutional duty to protect or ban on discrimination in the supply of protection, and Measure 26 itself introduces no duty to protect or such an antidiscrimination requirement into the Mississippi Constitution.