

MEASURE 26: FEAR MONGERING, SELF-EXECUTION & POTENTIAL IMPLICATIONS FOR BIRTH CONTROL

*Jonathan F. Will**

INTRODUCTION

What Measure 26 (the Mississippi Personhood Initiative) lacks in words, it more than makes up for in potential and possibly unintended implications. Some proponents suggest that the personhood movement is simply about returning to “first principles.”¹ It is about changing the public perception to acknowledge the sanctity of all human life from the earliest moments of development. The word “moments” is mine, not theirs.

In fact, Measure 26 purports to define personhood at a single moment—fertilization. The proposed amendment reads: “As used in this Article III of the state constitution [the Bill of Rights], ‘The term “person” or “persons” shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof.’”² Choosing fertilization as the person-defining “moment” is legally and medically both significant and ambiguous.³

* Mississippi College School of Law, Assistant Professor of Law and Director of the Bioethics & Health Law Center. I would like to thank the MC Law community for its support, as well as Professor John Anderson (MC Law), Professor Caitlin Borgmann (CUNY Law School, and contributor to this symposium), Professor Glenn Cohen (Harvard Law School), Stephen Crampton (Liberty Counsel), Professor Christopher R. Green (University of Mississippi School of Law, and contributor to this symposium), Rebecca Kiessling (national spokeswoman for Personhood USA), Amelia McGowan (Mississippi ACLU), Professor Tommy Smith (pharmacy law and ethics, University of Florida), Dr. Michael Tucker (embryologist), and Renee Whitley (RESOLVE) for taking time to speak with me about these and other issues surrounding Measure 26.

¹ See, e.g., DANIEL C. BECKER, *PERSONHOOD: A PRAGMATIC GUIDE TO PROLIFE VICTORY IN THE 21ST CENTURY AND THE RETURN TO FIRST PRINCIPLES IN POLITICS* (2011).

² 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>.

³ See Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199, 203 (2006); I. Glenn Cohen & Jonathan F. Will, Op-Ed., *Mississippi's Ambiguous 'Personhood' Amendment*, N.Y. TIMES (Oct. 31, 2011),

Depending on what we mean by “fertilization,” there could be impacts on many reproductive choices including birth control, fertility treatments like in vitro fertilization (IVF), and of course, women’s ability to choose to have an abortion.⁴ Certain proponents⁵ of Measure 26 suggest that even discussing these implications (other than perhaps abortion) amounts to fear mongering.⁶ While primarily focusing on birth control, the goal of this essay is to introduce⁷ readers to why the concerns regarding these reproductive choices are very real, and how these concerns are further complicated by the issue of whether, if passed, Measure 26 would be deemed “self-executing.”

I. SOME BASIC REPRODUCTIVE PHYSIOLOGY/TERMINOLOGY

Measure 26 uses “fertilization” as the person-defining moment entitling these newly-appreciated persons to constitutional rights and protections. But what exactly do we (or could we) mean by fertilization? The statutory frameworks of many states consider the term “fertilization” to be synonymous with the term “conception.”⁸ Conception is perhaps even more

<http://www.nytimes.com/2011/10/31/opinion/mississippi-ambiguous-personhood-amendment.html>; Jonathan F. Will, Op-Ed., *Life and Law – The Commitment to Pre-Embryonic Personhood*, MISS. BUS. J. (Sept. 23, 2011), <http://msbusiness.com/2011/09/op-ed-life-and-law—the-commitment-to-pre-embryonic-personhood>.

⁴ Will, *supra* note 3. It is worth pointing out that I am approaching these issues from a different angle than Professor Green. See Christopher R. Green, *A Textual Analysis of the Possible Impacts of Measure 26 on the Mississippi Bill of Rights*, 81 MISS. L.J. SUPRA 39 (2011). Professor Green seems to focus on what the Mississippi legislature would be *required* to do were Measure 26 to pass. The views expressed in the Mississippi Business Journal Op-Ed and here address what *could* happen if the amendment passes and, from a normative standpoint, what *should*, or *ought* to happen if we wish to remain consistent in our respect for and protection of pre-embryonic persons.

⁵ The “fear mongering” accusation has been used widely. It came up very recently in the symposium hosted by Mississippi College School of Law. Panel Discussion at the Mississippi College School of Law Symposium: Amendment 26 – Exploring the Implications of Mississippi’s Personhood Initiative (Oct. 25, 2011) (video recording on file with author).

⁶ Fear mongering (or scaremongering or scare tactics) is the use of fear to influence the opinions and actions of others towards some specific end. *Fearmongering*, OXFORD DICTIONARIES ONLINE, <http://oxforddictionaries.com/definition/fearmongering> (last visited Nov. 2, 2011).

⁷ I will explore many of these issues in greater detail in a forthcoming work.

⁸ Peters, *supra* note 3, at 200-04.

ambiguous and, depending on the interpretation chosen, would allow us to draw a line at many different points in the reproductive process, beginning with the moment the sperm makes contact with the egg in the fallopian tube and ending at the conclusion of the implantation process some seven to twelve days later.⁹

Reviewing the information available on Personhood USA's website, it is apparent that proponents of personhood initiatives across the country (not just in Mississippi) are not willing to define personhood at the conclusion of the implantation process, which itself may take as long as a week to complete.¹⁰ Rather, one finds this reference: "[The zygote], formed by the union of an oocyte [egg] and a sperm, is the beginning of a new human being."¹¹

If this is the understanding of when personhood begins, why does Measure 26 not specifically state that the term "person" or "persons" includes zygotes or every human being from the union of an oocyte and a sperm? Unfortunately, as Professor Peters points out, even this level of specificity would not eliminate the ambiguity.¹²

Our current understanding of human reproductive physiology is that the union of the genetic material contained in the egg and sperm, thus creating a genetically unique pre-embryo,¹³ takes place over the period of two to three days.¹⁴ Beyond this, the first

⁹ See, e.g., SUSAN TUCKER BLACKBURN, *MATERNAL, FETAL, & NEONATAL PHYSIOLOGY: A CLINICAL PERSPECTIVE* 78-80 (2007); Peters, *supra* note 3, at 204-16 (discussing the biology of the early reproductive process).

¹⁰ Peters, *supra* note 3, at 215.

¹¹ *What is a Person?*, PERSONHOOD USA, <http://www.personhoodusa.com/what-is-personhood> (citing KEITH L. MOORE, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 2, 16 (7th ed. 2003)) (first bracket in original) (last visited Oct. 26, 2011).

¹² See generally Peters, *supra* note 3.

¹³ It is worth pointing out that skin cells, liver cells, etc. contain the complete and distinct genetic code of an individual, yet no one seriously contends that skin cells are morally or legally equivalent to persons. Pre-embryo is the term typically assigned to the fertilized ovum until implantation is complete, though many would point out that the terms are not always used consistently. See BARRY R. FURROW ET. AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 101 (6th ed. 2008) (noting that the "terminology of early pregnancy is rife with alternative phraseology").

¹⁴ Peters, *supra* note 3, at 205-215. Dr. Michael Tucker showed a time-lapsed video of this process taking place during the Mississippi College School of Law symposium. Dr. Michael Tucker, Panelist at the Mississippi College School of Law Symposium:

series of cellular divisions are driven by leftover protein contained within the egg itself, and not by activation of the embryonic genome of this “new” genetic person.¹⁵

Where you define personhood along this continuum dictates which forms of birth control or fertility treatments will be potentially at risk under Measure 26. With respect to fertility treatments, it would be necessary to draw lines around the more complicated science of gamete fusion and genomic activation due to the timing that various actions take place, such as freezing embryos, pre-implantation genetic diagnosis, and so forth. But in order to explore the potential ramifications for birth control options, we need only assume (without conceding) that Measure 26 defines personhood as the singular moment the sperm enters the egg.

II. POTENTIAL IMPLICATIONS FOR VARIOUS BIRTH CONTROL METHODS¹⁶

Simply put, any birth control method that is effective after fertilization occurs would be problematic¹⁷ were Measure 26 to

Amendment 26 – Exploring the Implications of Mississippi’s Personhood Initiative (Oct. 25, 2011) (video recording on file with author).

¹⁵ Tucker, *supra* note 14.

¹⁶ Because we are assuming for purposes here that personhood begins as soon as the sperm penetrates the egg, it is unnecessary to discuss abortifacients like mifepristone (more commonly known as RU-486 or the abortion pill), which can dislodge a fully-implanted embryo from the uterine wall. Jennifer E. Spreng, *Pharmacists and the “Duty” to Dispense Emergency Contraceptives*, 23 ISSUES L. & MED. 215, 225 (2008). Use of RU-486 would be problematic even if we identified personhood as late as completion of the implantation process. Similarly, condoms (both male and female), spermicides, diaphragms, cervical caps, and other birth control methods that prevent fertilization from occurring as an initial matter would not seem to be problematic under Measure 26 (though some religious groups are not willing to endorse any form of birth control).

¹⁷ I feel compelled here to raise, though I set aside for a later paper, the issue that even if we concede pre-embryonic personhood, it may, though it does not necessarily, follow that abortion, certain birth control methods, IVF, and so forth would become illegal. At least with respect to abortion, Justice Blackmun may have implicitly assumed so in writing the so-called Blackmun Hole into the majority opinion in *Roe*, and proponents of personhood initiatives across the country certainly hope so, but that does not make it so. *Roe v. Wade*, 410 U.S. 113, 156-57 (1973). Following passage of Measure 26 the inquiry would involve a person’s right to life (just like you and me). The state’s interest in protecting that life would be on much more solid ground, because we seemingly would no longer have to struggle with concepts like protecting fetal life,

pass, particularly, as will be discussed more fully below, if the amendment is deemed to be self-executing. The reason is that such birth control methods permit (or at least potentially permit) a person to come into existence and then intentionally cause that person's demise. There is no question that physicians often intentionally prescribe, and women intentionally take birth control to prevent pregnancy.¹⁸ The problem is that Measure 26 does not associate "person" with "pregnancy."

Returning briefly to reproductive physiology,¹⁹ in the IVF context, a relatively small number of sperm are placed in close proximity to an egg (in a Petri dish), or a single sperm is directly injected into the egg (via intra-cytoplasmic sperm injection). Artificial insemination can simply involve introduction of the sperm into the vaginal canal by a means other than the penis.

The typical male ejaculate contains more than 100 million sperm,²⁰ but in the long journey toward the fallopian tube where fertilization naturally takes place, the rate of attrition is astronomical. Dr. Tucker reported that as few as ten to one hundred sperm make it to the egg.²¹ This is largely due to the slightly acidic environment within the vagina, which is naturally hostile to sperm's basic pH.²² Once the sperm penetrates the egg, the pre-embryo begins a week-long journey through the fallopian tube toward the uterus.²³ During this time, hormones released in connection with the development of the pre-embryo stimulate the lining of the uterus for implantation.²⁴

Given the size of the sperm cell and pre-embryo, the relative distances that must be traveled, and the hostility of the environment, it is perhaps no wonder that greater than fifty

potential life, life of the unborn child, etc. But this merely changes the nature of the inquiry, it does not answer the question. *See generally* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF., no. 1, 1971 (arguing that my right to life does not necessarily carry with it a duty placed on other persons to keep me alive).

¹⁸ Admittedly, some sexually inactive women are prescribed birth control to regulate their menstrual cycle or to lessen the symptoms associated therewith.

¹⁹ The following information can be found in Dr. Michael Tucker's remarks at the Mississippi College School of Law symposium. Tucker, *supra* note 14.

²⁰ Tucker, *supra* note 14.

²¹ *Id.*

²² BLACKBURN, *supra* note 9, at 75.

²³ *See supra* Part I.

²⁴ BLACKBURN, *supra* note 9, at 76.

percent (50%) of all fertilized ova are naturally expelled from a woman prior to successful implantation. This often occurs without her even knowing fertilization has occurred.²⁵ While fertility treatments seek to overcome these natural hurdles, birth control methods seek to strengthen them. But it is the ways in which birth control methods do this that is problematic under a framework where personhood begins as soon as the sperm penetrates the egg.

Use of abortifacients, like RU-486 that may dislodge a fully-implanted embryo, would be akin to abortion and thus problematic under this framework. Most physicians agree that a pregnancy certainly exists following successful implantation.²⁶

That said, we quickly descend into a gray area when we consider other types of birth control and their mechanisms of operation.²⁷ Plan B (the morning after pill), for instance, “operates in three ways to prevent pregnancy: (1) by preventing ovulation from initially occurring, (2) by preventing fertilization of the egg [by thickening cervical mucus and thereby decreasing sperm mobility], and (3) by altering the endometrium of the womb in order to prevent actual implantation of a fertilized egg.”²⁸ Where implantation is avoided, it may not be clear which mechanism was successful, though we are very much aware of the possibility that it was option three. Similarly, certain intrauterine devices (IUDs) may permit the release of an egg from a woman’s ovary, permit sperm to reach and potentially fertilize the egg, but then be effective in preventing this newly-recognized person from implanting in the woman’s uterine wall.²⁹

But perhaps most troubling is that even though many standard hormonal birth control methods that women take on a

²⁵ Michael J. Sandel, *Embryo Ethics – The Moral Logic of Stem-Cell Research*, 351 N. ENGL. J. MED. 207, 208 (2004).

²⁶ Brittany L. Grimes, Note, *The Plan B for Plan B: The New Dual Over-the-Counter and Prescription Status of Plan B and Its Impact Upon Pharmacists, Consumers, and Conscience Clauses*, 41 GA. L. REV. 1395, 1399 (2007).

²⁷ Dena S. Davis, *Contraception, Abortion, and Health Care Reform: Finding Appropriate Moral Ground*, 29 MISS. C. L. REV. 379, 380 n.7 (2010).

²⁸ Grimes, *supra* note 26, at 1398-99 (citation omitted); *see also* Spreng, *supra* note 16, at 223.

²⁹ *See, e.g.*, Rachel White-Domain, Comment, *Making Rules and Unmaking Choice: Federal Conscience Clauses, the Provider Conscience Regulation, and the War on Reproductive Freedom*, 59 DEPAUL L. REV. 1249, 1260 (2010).

regular basis (be they pills, shots, patches, etc.) primarily function to prevent fertilization from occurring, they may also be effective in preventing implantation. The mechanism that prevents ovulation [release of the egg from the ovary], may fail in this regard, but still succeed in making the uterine lining inhospitable for implantation.³⁰ The truth of the matter is that physicians cannot “know with certainty whether contraceptives prevent implantation of a fertilized egg [leading to the death of this newly-recognized person].”³¹

If we are committed to pre-embryonic personhood and protecting our most innocent, then how can raising these issues be fear mongering? We must consider whether these forms of birth control present an unacceptable risk of loss of human life. Now, the result of that inquiry is far from certain. After all, as one of my colleagues frequently reminds me in the context of health care reform and otherwise, we allow people to die every day. But to suggest that it is unnecessary or fear mongering to entertain this discourse reflects a lack of commitment to the position,³² and worse, it is misleading.

Even outside the context of Measure 26, the discussion is very clearly necessary. A preliminary draft of the short-lived Provider Conscience Regulation (PCR),³³ which was promulgated during the Bush Administration in 2008 to protect providers refusing to perform certain actions based on conscience, attempted to define abortion “to include any action that prevents the implantation of a fertilized egg, effectively including the birth control pill, other hormonal contraceptives and the intrauterine

³⁰ *Id.* at 1260 & n.84 (citing Russell Shorto, *Contra-Contraception: Is This the Beginning of the Next Culture War?*, N.Y. TIMES MAG., May 7, 2006, at 48, 53).

³¹ *Id.* at 1260 n.84 (citing Shorto, *supra* note 30, at 48, 53) (noting that part of the problem stems from the fact that it is difficult to test and distinguish between fertilized ova lost due to contraceptive use versus the vast number of fertilized ova that are naturally discarded).

³² See generally Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551 (2009) (lamenting this lack of moral commitment).

³³ White-Domain, *supra* note 29, at 1250 n.13 (identifying the full name of the regulation as “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law” (quoting 45 C.F.R. § 88 (2008))).

device.”³⁴ Most of the PCR was rescinded by the Obama Administration earlier this year,³⁵ but it highlights the importance of discussing the relationship between pre-embryonic personhood and access to birth control.

III. SELF-EXECUTION, LEGISLATIVE ACTION, AND CONSTITUTIONAL ACCESS TO BIRTH CONTROL: WHY THERE SHOULD BE CONCERN

If Measure 26 passes on November 8, 2011, and survives state and federal constitutional challenges, the issue then becomes whether the language of the amendment is effectively self-executing. Said another way, would the language effectuate change on its own, or would it require enabling legislation to set it in motion?

In *State ex rel. Barron v. Cole*, the Mississippi Supreme Court noted: “There are in our constitution many provisions that are self-executing, and not requiring legislative action to make them effective; but they are unmistakable from their terms”³⁶ The language of Measure 26 purports to be limited to the four corners of the Bill of Rights. It does say: “As used in this Article III of the state constitution”³⁷ And one might argue that it is merely setting forth “first principles” or policies as opposed to trying to accomplish anything substantive, like informing the interpretation of the Mississippi Code. But this is not the only logical read.

The Court’s opinion in *Oktibbeha County Board of Education v. Town of Sturgis*³⁸ provides some additional guidance. The Court noted that:

³⁴ Adam Sonfield, *Proposed ‘Conscience’ Regulation Opposed Widely as Threat to Reproductive Health and Beyond*, 11 GUTTMACHER POL’Y REV., no. 4, 2008, available at <http://www.guttmacher.org/pubs/gpr/11/4/gpr110417.html>.

³⁵ Rob Stein, *Health ‘Conscience’ Rule Replaced*, WASH. POST, Feb. 19, 2011, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021807443.html>.

³⁶ *State ex rel. Barron v. Cole*, 32 So. 314, 315 (Miss. 1902).

³⁷ 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>.

³⁸ 531 So. 2d 585 (Miss. 1988).

There is an obvious distinction between Sections 17 and 79, which have been held to be self-executing, and Section 80, which has been held to be not self-executing: both Sections 17 and 79 grant distinct individual constitutional rights. . . . When a constitutional provision grants a distinct right, the provision is self-executing and requires no legislation to effectuate it.³⁹

Measure 26 grants constitutional rights. As Professor Green points out, there are many references to “person” in the Bill of Rights, and Section 24, granting access to courts, is a good example.⁴⁰ In addition, Section 14 provides that “[n]o person shall be deprived of life, liberty, or property except by due process of law.”⁴¹

If the Mississippi Constitution had an equal protection clause,⁴² the analysis might be simpler. For instance, to the extent the existing criminal statutes were not interpreted to extend equally to loss of pre-embryonic life, that might raise equal protection issues. Still, given that the statutory framework is already in place to effectuate Measure 26,⁴³ it seems possible for

³⁹ *Oktibbeha*, 531 So. 2d at 588 (citing *Rose v. State*, 123 P.2d 505 (Cal. 1942); 16 AM. JUR. 2D *Constitutional Law* § 140 (1979)); see also MISS. CONST. art. III, § 17 (taking property for public use; due compensation); MISS. CONST. art. IV, § 79 (sale of delinquent tax lands; right of redemption); MISS. CONST. art. IV, § 80 (permitting enactment of general laws to prevent abuse of municipal powers). There is another citizen initiative on the November 8, 2011, ballot that speaks directly to Section 17 of the Mississippi Bill of Rights, but the self-executing nature of that amendment is beyond the scope of this paper. Miss. Initiative 31 (2011) (proposed MISS. CONST. art III, § 17), available at <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Eminent%20Domain-PW%20Revised.pdf>.

⁴⁰ MISS. CONST. art. III, § 24; Green, *supra* note 4, at 42-44.

⁴¹ MISS. CONST. art. III, § 14.

⁴² As Professors Bell and Green point out in their contributions to this symposium, it is entirely possible that the Mississippi Supreme Court would interpret Section 14 of the Bill of Rights to include an equal protection guarantee. Deborah H. Bell, *Disputes Over Frozen Embryos*, 81 Miss. L.J. Supra 112-13 (2011); Green, *supra* note 4, at 51-53.

⁴³ In *Oktibbeha*, the Court paid particular attention to the fact Section 80 merely permits general laws to be enacted, the framework for effectuating the constitutional language itself needed to be put in place. *Oktibbeha*, 531 So. 2d at 588. The analysis of Measure 26 would be very different if it sought to create a special status for pre-embryos as the Tennessee Supreme Court did in *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). If the proposed constitutional amendment was drafted as such, there would need to be enabling legislation put in place to define what exactly that “special status” would look like. But as drafted, the statutory framework is already in place to effectuate protection of human persons.

the Mississippi Supreme Court to use Section 14 as a mechanism to apply the new recognition of pre-embryonic persons consistently throughout the Mississippi Code (where literally thousands of references to persons exist).

The language of Measure 26 would then be effectively self-executing, because no action by the legislature would be required to further its purpose. Indeed, if Mississippi citizens vote in favor of Measure 26 as a means of seeking protection for pre-embryonic persons, given that this protection is available within the existing statutory framework, any interpretation of Measure 26 to the contrary could be viewed as inconsistent with the will of the people.

Ultimately, the Mississippi Supreme Court will have to determine the self-executing nature of the amendment as it relates to the existing statutory framework. But because it is unclear, there are grounds for concern. To the extent the amendment needs no enabling legislation, once effective,⁴⁴ state officials (including local prosecutors)⁴⁵ could immediately undertake to investigate women for what the individual prosecutor thinks may be an illicit use (or potential use) of birth control.

For instance, suppose a woman is reported for using an IUD. Would she be required to have the IUD removed or face criminal assault charges if the local prosecutor deemed her use of this birth control method to be an “attempt[] to cause or purposely, knowingly or recklessly cause[] bodily injury to another”?⁴⁶ Interestingly, Mississippi does not currently have an attempted murder statute, though Attorney General Jim Hood is pushing for one.⁴⁷ What that statute might look like following Measure 26 is anyone’s guess.

⁴⁴ “An initiative approved by the electors shall take effect thirty (30) days from the date of the official declaration of the vote by the Secretary of State, unless the measure provides otherwise.” MISS. CONST. art. XV, § 273(10).

⁴⁵ Rebecca Kiessling conceded as much during the Mississippi College School of Law Symposium. Rebecca Kiessling, Panelist at the Mississippi College School of Law Symposium: Amendment 26 – Exploring the Implications of Mississippi’s Personhood Initiative (Oct. 25, 2011) (video recording on file with author).

⁴⁶ MISS. CODE ANN. § 97-3-7(1)(a) (2006 & Supp. 2011).

⁴⁷ Cherie Ward, *Mississippi Attorney General Jim Hood Wants Attempted Murder Charge in State*, GULFLIVE.COM (Apr. 4, 2011, 6:02 AM), http://blog.gulflive.com/mississippi-press-news/2011/04/mississippi_attorney_general_j_1.html. The Mississippi

Or suppose a disgruntled boyfriend reports that his girlfriend is planning to take the morning after pill following a night of unprotected sex, which could be considered criminal as a “threat[] . . . of injury to the person . . . of another.”⁴⁸ Could she then be arrested and retained to prevent her from having access to Plan B just in case fertilization has already occurred?⁴⁹

Importantly, this is not to suggest that either of these scenarios represent the required result (absent some legislative mandate), nor that they reflect what necessarily would occur (it would seem to be up to the discretion of the local prosecutor). There are obviously evidentiary challenges involved in these situations, but that does not address whether, if we are committed to pre-embryonic personhood, we would want this to be the result. If we want a framework that protects these innocent persons, would evidentiary difficulties justify failing to attempt any action or investigation at all?

Even if Measure 26 is not self-executing as it relates to the rest of the Mississippi Code, the amendment puts the state in a strong position to enact legislation in the furtherance of a compelling interest to protect these newly-recognized persons. Everyone is anticipating the statute outlawing abortion,⁵⁰ perhaps without exceptions for rape⁵¹ or situations where the woman’s life is at risk. The latter situation may be handled through the justifiable⁵² or excusable⁵³ homicide framework that already exists.

If the citizens of Mississippi vote to approve Measure 26, indicating a commitment to protecting pre-embryonic personhood, and if the legislature is committed to representing the people’s interests, should the voters not expect extensive legislation to protect these pre-embryonic persons from the dangers of IVF and

Code does include a general statute addressing attempted offenses. MISS. CODE ANN. § 97-1-7 (2006).

⁴⁸ MISS. CODE ANN. § 97-3-87 (2006).

⁴⁹ MISS. CODE ANN. § 99-3-15 (2007).

⁵⁰ We should be mindful that statutes banning abortion would be subject to federal constitutional challenge.

⁵¹ Thomson, *supra* note 17. Judith Jarvis Thomson’s defense of abortion on the basis of the woman having no duty to preserve or protect the person inside her is perhaps strongest in the context of rape, setting aside the issue of degrees of rape.

⁵² MISS. CODE ANN. § 97-3-15 (2006).

⁵³ MISS. CODE ANN. § 97-3-17 (2006).

our lack of certainty as to whether certain forms of birth control are effective after fertilization?

Assuming the legislature attempts to limit access to certain types of birth control, there may not be as much protection as one might think from the United States Supreme Court's birth-control jurisprudence. While we may be comfortable assuming that Mississippi would not be permitted to restrict access to all types of birth control,⁵⁴ it is far less clear whether the legislature, armed with its newly solidified interest in protecting pre-embryonic persons, could seriously restrict access to certain types of birth control or fertility treatments. You might imagine the analysis resembling the *Planned Parenthood of Southeastern Pennsylvania v. Casey* undue-burden/substantial-obstacle framework.⁵⁵

CONCLUSION

The fact that Measure 26 uses fertilization as the person defining "moment" is legally and medically significant and ambiguous. In the context of potential implications for birth control, there is good cause for concern. It is not entirely clear how "fertilization" will be defined. If it follows the proponents' expressed wishes, we can anticipate personhood being attached closer to a sperm touching an egg than completed implantation.

If the amendment passes and is found to be effectively self-executing, that would permit investigation or prosecution under the existing statutory framework. Even if it is not self-executing, we might expect proposed legislation outlawing abortion to define abortion in terms similar to the proposed language in the PCR, which would have direct impacts on access to certain types of birth control.⁵⁶ Given that physicians prescribe and women often take birth control with the intention of preventing pregnancy, and that those pills, shots, and patches just might prevent pregnancy after the creation of persons, thinking through these issues is not fear

⁵⁴ See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (stating that "[a] finding of an undue burden is a 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"). This topic will be discussed in further detail in a forthcoming paper.

⁵⁶ See *supra* Part II.

mongering; rather, it is sound strategy if we want to be informed voters and have our voices heard.