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# THE HUMAN LIFE REVIEW

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## . . . about THE HUMAN LIFE REVIEW

This is our tenth issue. Although in each one of them we have tried to give detailed information as to the availability of previous issues, we continue to receive considerable mail on the subject. Therefore we have again included (see inside back cover) a complete description of what is available (single copies, bound volumes, etc.) along with instructions on just how to order them. Naturally, we expect to be deluged with orders.

In this issue, we touch on (for the first time) the Constitutional Convention question, which has been widely discussed in recent months as an "alternative" method of amending the Constitution. In fact there is an enormous amount of information on the subject — in law journals and other periodicals — but much of it is difficult to acquire without access to a good research library (or the Library of Congress, etc.). This was a major consideration to us in choosing Senator Ervin's for this issue: not only is it, in our judgment, an excellent one-article "primer" on the subject, but it originally appeared (in the *Michigan Law Review,* Vol. 66, No. 5, March 1968) along with another half-dozen articles on the same subject, including a most important one by the late Senator Everett McKinley Dirksen. To those who would like to know more about the Convention, we recommend starting with this MLR symposium (we are told that issues are available from William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209). Another excellent source is the booklet "Amendment of the Constitution by the Convention Method" published in 1974 by The American Bar Association (copies available, at $3.50 each, from the ABA, Public Service Activities Division, Dept. A, 1155 East 60th Street, Chicago, IL 60637), which not only discusses the question in depth but also lists a great many additional sources.

Finally, the original document from which we have extracted Appendix A (the full title appears in the introduction thereto) is available from the U.S. Government Printing Office in Washington.

# INTRODUCTION

"THE COURT'S decision, however, reached beyond the issue of abortion and signaled a radical departure from traditional notions regarding the nature of the family. It marked the beginning of what could become a grave assault upon existing legal protection of marriage and the family."

Thus says Jesse Helms, the Senior Senator from North Carolina, in our lead article. He is of course discussing the U.S. Supreme Court's 1973 *Roe* and *Doe* decisions (which made abortion on demand legal nationwide) and subsequent rulings that have followed from the original cases; in Mr. Helms' judgment, the growing body of abortion-related law is producing such disastrous social effects that, if the Court is not soon overruled *re* abortion, the very fabric of American society will be damaged beyond repair. His solution is a federal constitutional amendment that would ban abortion, and, in effect, return its regulation to the several states (where it had always resided until the Court acted).

We think the interested reader will not only find the article interesting but also useful: in addition to the arguments for his own solution, the Senator provides an excellent "short course" history of the entire abortion controversy — something not readily available elsewhere, despite the myriad number of abortion articles that have appeared in the public press in the last decade (for, although the Court acted just four years ago, the abortion controversy, in its present form, actually began in 1967). And he provides some rather disturbing statistics, e.g., that the abortion ratio has in fact increased from 6.3 per thousand live births in 1969 (in itself a sharp increase over the days when the "traditional morality" prevailed) to 241.6 in 1974, the latest year for which figures are available (and only the *first* full year of legalized abortion: without question, the rate has increased still further since then; indeed, in the nation's capital the latest figures show more abortions than live births). Also disturbing is his contention that a "major consequence of the Abortion Cases is that the practice of abortion has shifted from one used essentially as a last resort, in the so-called hard cases, to a primary means of family planning. In fact, certain studies indicate that abortion on demand will replace other methods . . ."

Along the way Mr. Helms points out some of the other problems that have arisen in direct result of the current abortion situation, notably euthanasia (currently being described as "the right to die" as a matter of "self-determination"). Another point caught our eye: that the "revival of the

constitutionality of a state's use of coercive methods . . . to implement a eugenics policy and reduce its public welfare expenditures perhaps foreshadows increased attempts by the State to mandate population controls." Just before reading that, we had been reading a document issued by the Joint Economic Committee of the United States Congress (Senator Hubert H. Humphrey, chairman) last December, in which a discussion of "Transferable Birth Licenses" is prominently featured. It seems to us that those who might feel that Mr. Helms' fears are unjustified ought to read this fascinating document, and so have reprinted it here (see Appendix A).

The Senior Senator from Utah, Jake Garn, follows with another proposal for ending abortion on demand — in fact, two of them. This article is adapted from his address to the Senate upon the introduction of his two Human Life Amendments (which differ mainly in nuance: the complete text of both, along with the co-sponsors of each, can be found in Appendix B). Senator Garn is deeply concerned with what he considers to be a series of false arguments being used to support legalized abortion, notably that abortion is somehow necessary "to achieve equality between the sexes," or that it is primarily (as is often charged) a religious issue. Re the latter, Mr. Garn says: "It is difficult to see how a Human Life Amendment would have a primary effect that either advances or inhibits religion. We are aware of the long lists of religious groups that favor permissive abortion because such lists have frequently been read on the floor of the Senate. If I were to follow the simplistic arguments of some who invoke the First Amendment . . . I could argue that the Supreme Court's decision was constitutionally impermissible because of the large number of religious groups which favor it." And he concludes: "It is the challenge of America to set the world's standard for human rights . . . a standard now requiring the ratification of a Human Life Amendment and a standard to which we invite all to adhere."

Next we have a most interesting article by the former Senior Senator from North Carolina, Sam J. Ervin (who became a "household face" nationwide while conducting the Senate's televised Watergate hearings in 1974). It concerns the Constitutional Convention method of amending the Constitution — a subject much-discussed in recent months as an alternative means of obtaining a Human Life Amendment. Of course, when Senator Ervin wrote this article (in early 1968), the current abortion controversy hardly existed (the convention calls then concerned the Supreme Court's landmark ruling in *Baker v. Carr*, the so-called "reapportionment" decision); however, for those new to the convention idea (which certainly includes us), it is difficult to find any single source that provides a general understanding of what is involved, and the history thereof. Having read dozens of articles (in law journals and elsewhere) on the subject, we concluded that Senator Ervin's original article is by far the best introduction to the subject, and so reprint it here (with his permission) in its original form, trusting that the reader will make the necessary allowances for the

time period involved. We also include the full text of Mr. Ervin's original Senate resolution, which was unanimously approved by his colleagues (after some revision, the most important being the substitution of a two-thirds for a simple majority vote at a convention) in the Senate, but never considered by the House. (We are informed that the Congress may consider the Ervin proposal again soon, which would make this article *very* timely.)

We have still more on the Court. Mr. James F. Csank sees many similarities between the Abortion Cases and the *Dred Scott* decision of the last century. He writes: "The issue in each case involved basic questions of the meaning of America's past, its beliefs about itself, and its direction for the future; issues which the Court either could not or would not acknowledge." Whether or not one agrees with Mr. Csank, the comparison between the cases is so frequently made that we think many readers will appreciate having his handy and "updated" appraisal of the famous *Scott* decision. But he provides a good deal more than that (including a rather detailed description of the original *Roe* and *Doe* cases as well). We find his arguments compelling, even though his conclusions are hardly happy ones for American society.

The next article shifts abruptly to another unhappy concern: what might be called "early"— very early — euthanasia. Until we read Dr. C. Everett Koop's article (with slight modification, it is the address he delivered to The American Academy of Pediatrics last year), we were unaware that any such problem existed, at least openly. But if Dr. Koop is correct, then infanticide is indeed being practiced in our hospitals, by, as he points out, "that very segment of our profession which has always stood in the role of advocate for the lives of children." For Dr. Koop, who has spent more than 30 years in the practice of pediatric surgery, this situation is unthinkable, and he begs his colleagues to think on what it means: "Let it not be said [by historians] that the extermination programs for various categories of our citizens could never have come about if the physicians of this country had stood for the moral integrity that recognizes the worth of every human life."

Mr. M. J. Sobran next takes his usual turn, which is, in part, a commentary on what can only be described as Dr. Koop's startling revelations. As usual, Sobran manages to put the whole thing in perspective (nobody around today can do it better). Given what Dr. Koop tells us is going on, Sobran's conclusion ("So far the case for infanticide has made little headway.") may seem overly-optimistic to some, and indeed he qualifies it himself ("As long as the bogus altruism of killing the child for its own good is permitted to go unanswered, we have no right to be complacent."). But it is at least a note of hope on which to conclude, and — considering the dispiriting nature of the subject — we hope he's right.

We conclude with the grim humor of Prof. David Louisell's fancy: a future report from Washington, *circa* 1984; as he points out, it should all

sound familiar (certainly to readers of this journal), and — Who knows? — it may not be all that fanciful. In more than a few ways, 1984 seems very close indeed.

In coming issues we expect to continue our discussion of matters pertaining to that basic unit of all societies, the family, for we agree with Senator Helms that our traditional ideas and ideals of family life (and the unique relationships involved) are coming under increasingly strong attack today. The question is of course closely connected with the so-called "population problem" (on which we also expect to have additional material soon). It would seem, from reading several recent articles on American population growth in the news magazines, that *over*population is now causing fewer fears than *under*population, and this remarkable turnaround in public perception is worth exploring.

Another subject of continuing concern is genetic engineering, on which, it seems to us, too little is reported by the media (although it receives a good deal of attention abroad, e.g., the excellent survey entitled "Pandora's box of genes" in the London *Economist* for March 5, 1977). Our difficulty to date has been in finding material that is both informative and intelligible; however, as the subject becomes more widely discussed (we are informed that Senator Edward Kennedy's subcommittee on health intends to explore the subject soon) good material will no doubt become available.

Meanwhile, we hope you will enjoy the issue in hand.

J. P. MCFADDEN
*Editor*

*Special Section:*

# A Human Life Amendment

*Senator Jesse Helms*

## *Introduction*

The highest level of moral culture is that at which the people of a nation recognize and protect the sanctity of innocent human life. All nations in which freedom and justice have governed the affairs of the people have upheld this principle, giving it the highest priority in their laws and customs. Indeed, this principle is the bedrock of Western civilization — the one principle, above all others, which has distinguished free and democratic systems from the barbaric regimes of the past and the totalitarian systems of today.

It is for this reason that abortion — the taking of innocent human life — has, until very recent times, been viewed as violative of this basic principle of the Western tradition. And it is no mere coincidence that the modern practice of abortion first appeared as a policy of government in the Nazi and Communist dictatorships, where contempt for the dignity of human life was and is widely demonstrated.

Two hundred years ago, a great nation was founded on principles of human rights — the right to life, liberty, and the pursuit of happiness. These are the lofty principles which appear in one of the most important documents in history, the Declaration of Independence of the United States of America. Four years ago, a dark shadow was cast over this document when the highest tribunal in the land, the Supreme Court, ruled that an unborn child in the womb is not a person entitled to the right to life, and may be deprived of life by the mother and her attending physician. The decision has thrown America into a moral crisis.

Between 1967 and 1970, a number of states adopted liberalized abortion laws. During 1971, 30 state legislatures considered repealing their restrictive statutes, and every state rejected such proposals. In 1972, Connecticut adopted a more restrictive law, and the New York legislature repealed its liberal statute — and act which was subsequently vetoed by Governor Rockefeller. Also in 1972, Michi-

**Jesse Helms** is the Senior United States Senator from North Carolina. He is a Baptist deacon and was recently honored with the Southern Baptist National Award for Service to Mankind. His new book is *When Free Men Shall Stand* (*Zondervan Books,* Grand Rapids, Mich. 1976).

gan and North Dakota rejected liberalized abortion by wide margins in popular referendums. Clearly, the American public had refused to continue to accept liberalized abortion and perhaps had even decided that the earlier acceptance of such laws had been premature. However, in 1973, the Supreme Court removed consideration of the issues involved in this national abortion debate from the states and the public by its rulings in *Roe v. Wade* and *Doe v. Bolton*. Because of the absolute position taken by the Court in the Abortion Cases and its rigid adherence to, and indeed expansion of, that position in its subsequent opinions, it has become obvious that only a constitutional amendment will restore legal protection to unborn children in the United States. Furthermore, only the amendment process will return the issue of abortion to the people for resolution through the ratification procedure.

## *II. The Supreme Court Abortion Cases*

In *Roe v. Wade*,[1] the Supreme Court invalidated a Texas statute which prohibited abortions except those necessary to save the life of the mother. In its companion decision, *Doe v. Bolton*,[2] the Court similarly invalidated as too restrictive a liberal Georgia statute based upon the Model Penal Code of the American Law Institute. The Georgia statute permitted abortion in circumstances where:

1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or
2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or
3) The pregnancy resulted from forcible or statutory rape.

The Court ruled that the ability of the State to regulate abortion depends upon the stage of pregnancy at which such action is taken. During the first three months of pregnancy, a state may not interfere with the abortion decision of the woman and her physician. During the next three months the state may adopt regulations regarding the abortion procedure, but only in ways related to maternal health. Only during the final three months of pregnancy may the state regulate abortion except when such action would interfere with the health of the mother. The Court then made such distinctions meaningless, as a practical matter, by defining the health of the mother to include her "psychological as well as physical well-being," and by further instructing that the medical judgment of the woman and her physician be made in light of the physical, emotional, psychological, familial, and age factors relevant to the well-being of

the mother. In short, the Court's definition of "health" resulted in abortion on demand being elevated to a constitutional right.

The Court based its decision on the recently articulated right of privacy. In the majority opinion, Justice Blackmun wrote:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

However, aside from the issue of the woman's right to privacy, the other constitutional issue raised in the Abortion Cases relates to the life of the unborn child and its constitutional protection. In determining the constitutional standing of the unborn child, the Court laid great emphasis upon the fact that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." It was further impressed by the use of the word "person" in the Constitution, finding that "it has application only postnatally" and by its view of prevailing abortion practices during the 19th Century. One analysis of the Court's reasoning outlined its holding and commented as follows:

> Since the text of the Constitution itself does not define unborn as persons; and since American anti-abortion laws were once less restrictive than they became in the latter half of the nineteenth century; and since the courts have not before clearly upheld Fourteenth Amendment rights for the unborn — they do not have such rights.
>
> Curious reasoning for the modern Supreme Court. Has it hesitated, in the areas of civil rights, busing, apportionment and any number of others, to find "rights" not explicitly mentioned in the Constitution; "rights" consistently abridged by old laws; "rights" never before discovered by any other court? The modern, activist Supreme Court has not hesitated to do all these things.[3]

In part the Court reached its decision denying constitutional protection to the unborn upon its refusal to deal with the issue of the biological humanity of the unborn child. The Court maintained that "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus. . ." Doctors, philosophers and theologians, however, are generally agreed that "*to be willing to kill what for all we know could be a person is to be willing to kill it if it is a person.*"[4] This is the essential conclusion of the Supreme Court's Abortion Cases and as such it foreshadows danger for other groups of human beings whose "humanity" may at a future time be questioned by some advocates.

## *III. The New Liberty under the 14th Amendment*

The Fourteenth Amendment states that, "No State shall deny any person life, liberty, or property without due process of law." For the past fifty years, the Supreme Court has been broadly interpreting the word "liberty" contained in that amendment to include the liberties guaranteed by the Bill of Rights. Through the so-called Doctrine of Incorporation, the Court has taken it upon itself to "incorporate" nearly all of the Bill of Rights into the word "liberty" of the Due Process Clause of the Fourteenth Amendment. In this manner, the Court has succeeded in nationalizing the Bill of Rights so as to make its provisions applicable to the States.

What is disturbing about the doctrine of incorporation is that it not only undermines Federalism and the grand design of the Bill of Rights, but it also permits the Court, on its own authority, to interpret the word *liberty* in any manner that it chooses. The Court has advanced beyond the stage in interpreting the word *liberty* in light of the liberties guaranteed by the Bill of Rights to the point where it is now fabricating new liberties not contained in the Constitution.

In the Abortion Cases, seven Justices on the Court argued that the word "liberty" in the Due Process Clause establishes a right of privacy and that this includes the right to have an abortion. The basis for this interpretation of the word *liberty* cannot be inferred from the language of the Constitution. It cannot be inferred from the legislative history of the Fourteenth Amendment. It cannot be attributed to the social customs of the American people. The abortion decisions, as a Member of the Court itself declares, are simply an exercise in "raw judicial power."

The justices themselves openly admitted that this new right of privacy was a judicial creation. Justice Blackmun wrote "The Constitution does not explicitly mention any right of privacy." Justice Douglas stated that "There is no mention of privacy in our Bill of Rights." Justice Stewart maintained "There is no constitutional right of privacy, as such." In his dissenting opinion, Justice White states "The Court simply fashions and announces a new constitutional right for pregnant mothers." Justice Rehnquist also dissented saying, "I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case . . . Nor in the 'privacy' which the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution which the Court has referred to as embodying a right to privacy."

Many who support this type of judicial activism do so by maintaining that the Constitution is a living document and that the Court must be permitted to interpret it with the widest possible flexibility. To this proposition I respond by agreeing with Senator Sam Ervin that:

> When they say the Constitution is a living document, they really mean that the Constitution is dead, and that activist justices as its executors may dispose of its remains as they please. I submit that if the Constitution is, indeed, a living document, its words are binding on those who pledge themselves by oath or affirmation to support it.[5]

One essential problem confronting an activist judiciary is when to stop, once it is admitted that any activity can be viewed as a liberty under the Fourteenth Amendment. Did the framers and ratifiers of the Fourteenth Amendment intend to deny personhood to the unborn? Such an interpretation flies in the face of the facts. There is not an ounce of evidence to support such an interpretation. Indeed the widespread adoption of State laws regulating and prohibiting abortion and the later judicial interpretations of these statutes as intending to protect the lives of unborn children suggest that the framers of the Fourteenth Amendment felt that the provisions of that Amendment were consistent with such legislation.

The *Roe v. Wade* and *Doe v. Bolton* decisions are not the first time in American legal history that a Supreme Court ruling opposed the social and moral customs of a majority in American society. It was little more than a century ago that the Supreme Court handed down the decision of *Dred Scott v. Sandford.*[6] Arrogating to itself the awesome power of deciding who is a person in our society, the Court ruled that the free descendants of slaves could never be citizens and that slaves were not even persons under the law.

Not every Member of the Court accepted this legal fiction; and Justice Benjamin Curtis deeply resented the attempt by the Court to impose an interpretation of the Constitution that was derived from non-legal considerations. He stated that:

> Political reasons have not the requisite certainty to afford rules of judicial interpretation. They are different in the same men at different times . . . we are under the government of individual men, who for the time being have power to deduce what the Constitution is, according to their own views of what it ought to mean.

After much bloodshed and death, the *Dred Scott* case was finally reversed by the Fourteenth Amendment. No one would have dreamed in 1868 that the life and liberty guaranteed to all persons by the Due Process Clause of the Fourteenth Amendment meant

the right to have an abortion. Similarly, no one would have imagined that an Amendment designed to protect an oppressed minority in 1868 would be used in 1973 to remove another minority from the protection of the law.

Professor Joseph Witherspoon has observed that the intended reach of the Thirteenth and Fourteenth Amendments would include the unborn child.

> The legislative history of these two amendments fully demonstrates that the central purpose of their framers was, indeed, to protect every class of human beings, including unborn children, with respect to their rights to life, liberty, and the pursuit of happiness. They intended to establish a definition or concept of human beings based upon biological reality and common sense or scientific truth. In their view, whoever is a human being in fact is a human being or person in law protected by these two amendments. The concept of person used in the Due Process and Equal Protection Clauses and the concept of human being embodied implicity in the Thirteenth Amendment were precisely chosen or focused upon by these framers for the purpose of establishing this definition of the concept of person or human being, the two terms being thereafter wholly interchangeable with each other. It was their purpose by this definition to take away the power that had been exercised by legislatures, courts, chief executives, and administrative agencies in the past of treating or defining as a nonhuman being one who is a human being in fact or reality and by this sophisticated technique of legal devaluation divesting that human being of legislative and constitutional protections designed for human beings.[7]

Clearly the intent of these amendments is to protect those who are human beings in reality against the attempts to define away their personhood through legal abstraction or other techniques. The legislators who adopted these amendments had uncontradicted evidence before them that the fetus was indeed a human being. In 1868, the very year in which the Fourteenth Amendment was submitted to the states for ratification, Dr. Horatio Storer wrote in his book, *Criminal Abortion*, that:

> Physicians have now arrived at the unanimous opinion, that the foetus is alive from the very moment of conception . . . The willful killing of a human being, at any stage of its existence, is murder . . . Abortion is, in reality, a crime against the infant, its mother, the family circle, and society.[8]

Moreover, the Abortion Cases are not only a subversion of the Constitution, they are also a subversion of our democratic system of government. They represent the Court's disregard for the customs of the American people and its willingness to impose its own view of wise social policy upon the people of this country, the states, and even the Congress. Abortion is not a social custom of the American

people, nor has it ever been. The right to an abortion has never been held to be contained within the concept of ordered liberty implicit in the American tradition of justice.

## *IV. The Radicalism of the Abortion Decisions and Their Aftermath*

Justice Byron White, in his dissent against the abortion decisions, described the Court's action as "raw judicial power." An analysis of the firmly established precedents overturned and the method used by the Court in accomplishing this end makes clear the full force of Justice White's statement. The sweeping language of the abortion decisions means that human life has less protection in the United States today than in any country in the Western World.[9]

Western man has opposed abortion as far back as 1728 B.C., when the Code of Hammurabi was promulgated.[10] The Oath of Hippocrites, which we trace to ancient Greece, requires the doctor who is entering the practice of medicine to swear that, "I will not give to a woman a pessary to produce abortion."[11] The Mosaic Law of the Old Testament exacts a severe punishment for someone who injures a pregnant woman and causes her to lose her child.[12] The contemporary writings of the early Christian communities, such as *The Teaching of the Twelve Apostles,* states that "You shall not slay the child by abortions. You shall not kill what is generated." Early Christian writers such as Clement of Alexandria, Tertullian, Cyprian, John Chrysostom, Jerome, and Augustine all condemned abortion.[13]

Although historically there has not always been universal agreement regarding the necessity to protect unborn human life from abortion, there has definitely been an emerging moral imperative to do so beginning with the codes of Hammurabi, Moses and Hippocrites. True, the Greco-Roman world was not unfamiliar with abortion. But neither was it unfamiliar with slavery, infanticide, torture, tyranny, and other similar perversions of human nature. With the emergence of the Judeo-Christian view of the nature, value and equality of each person, society strongly embraced the notion that the unborn person in the womb must be protected. Professor John Noonan, in his comprehensive analysis of the history of abortion describes this attempt to protect unborn human life as "*an almost absolute value in history.*"[14] It is not an exaggeration to view the historical development of society's treatment of abortion as one towards greater protection of the child as society's understanding of medicine and biology as well as its regard for the value and equality of each individual increased.

Significant contemporary moral theologians continue this tradition of opposition to abortion. For example, Karl Barth in his *Church Dogmatics* for the Evangelical Church writes:

> The unborn child is from the very first a child. It is still developing and has no independent life. But it is a man and not a thing, not a mere part of the mother's body. . . He who destroys germinating life kills a man.[15]

And Rev. Dietrich Bonhoeffer defended the sanctity of human life amidst the turmoil of Nazi Germany in his book *Ethics*:

> Destruction of the embryo in the mother's womb is a violation of the right to live which God has bestowed upon this nascent life. To raise the question whether we are here concerned already with a human being or not is merely to confuse the issue. The simple fact is that God certainly intended to create a human being and that this nascent human being has been deliberately deprived of his life. And that is nothing but murder.[16]

Justice Blackmun, in his opinion, analyzed English common law and statutory law as well as American case law and statutory law. Detailed and comprehensive critiques of Mr. Justice Blackmun's reading of history have been made by many constitutional scholars and I do not intend to repeat them at length here. The underlining thrust of the Court's argument is that abortion was a right in England beginning with the 14th Century and in America during the 19th Century and as such is so fundamentally established by social and legal custom as to be somehow contained in the Constitution. After a lengthy examination of the Court's reasoning, Robert Destro, writing in the *California Law Review,* states that abortion "was never a right recognized by the common law, it cannot be considered to be a Ninth Amendment right retained by the people. The newly created right to procure an abortion is the creature of the substantive due process arguments and erroneous interpretations of history relied upon by the Court in *Roe;* it is not a right which may be characterized as 'so rooted in the traditions and conscience of our people to be ranked as fundamental.' "[17] Elsewhere, Mr. Destro writes ". . . the cases do not support the Court's interpretation. The Court's uncritical acceptance of an advocate's interpretation of the common law only served to confuse the issues and to rest an important constitutional holding on an erroneous historical foundation."[18]

**Early American Statutes**

The first modern statute in Anglo-American law prohibiting abortion was the English Act of 1803.[19] The first American statutes

against abortion appeared in the early 19th Century: Alabama, 1841; Arkansas, 1838; Connecticut, 1821; Illinois, 1827; Indiana, 1835; Iowa, 1839; the Kingdom of Hawaii, 1850; Maine, 1840; Massachusetts, 1845; New Hampshire, 1848; New York, 1828; Vermont, 1846; Virginia, 1848. By the end of the 19th Century, almost every state had adopted statutes regulating abortion. Although it was alleged by Justice Blackmun in his opinion in *Wade* that the primary reason for such regulation was the protection of the mother, a close examination leads one to agree with Professor Robert Byrn "that a major purpose (of these statutes) was the protection of unborn children without regard to age."[19] Among these early statutes, the one adopted by Colorado was not untypical. In 1872, the Supreme Court of Colorado held that its abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other."[20]

Many of these early statutes were adopted as a result of the reform activity of medical societies eager to see the law reflect medical knowledge concerning the unborn child. In 1859, the American Medical Association spoke out against abortion as the "unwarrantable destruction of human life." In 1867, the New York Medical Society condemned abortion as "murder" regardless of the stage of gestation when the operation was performed.[21]

On January 22, 1973, the people of all 50 states had statutes in force that regulated abortion. All of them, either in whole or in part, have suddenly become violations of the Constitution. A decision of the Court declaring an end to freedom of the press or the free election of the people's representatives would have as much basis in our legal heritage as the abortion decisions.

Some of the most notable constitutional scholars of the country have expressed shock and dismay regarding the reasoning employed by the Court in the abortion decisions. Professor John Noonan of the University of California, Berkeley, has stated that "Nothing in long-established precedent, nothing in the traditions of our people, nothing in history justified the majority's interpretation of liberty."[22] John Hart Ely, Professor of Constitutional Law at the Harvard Law School, has declared that *Roe v. Wade* is a "very bad decision . . . It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."[23] Professor Harry Wellington, Phelps Professor of Law at the Yale Law School, rightly insists that the Supreme Court had "no such mandate" from the Constitution to establish this peculiar "con-

cept of liberty in the Fourteenth Amendment."[24] Professor Charles Rice of the Notre Dame Law School has stated that *Roe v. Wade* is "the most outrageous decision ever handed down by the Court in its entire history."[25] Professor Robert Byrn of the Fordham University Law School is of the view that the Court's decision was premised on "multiple and profound misapprehensions of law and history."[26] And Professor Archibald Cox of the Harvard Law School finds that the Court failed "to lift the ruling above the level of a political judgment."[27] Professor Joseph Witherspoon of the University of Texas Law School has stated that the Abortion Cases "are unquestionably the most erroneous decisions in the history of constitutional adjudication by the Supreme Court."[28]

**Danforth Case A Blow to Families**

The Abortion Cases have also had a profound and radical influence upon decisions of the federal and state courts in such areas as the marital relationship, parental rights, state and local public welfare programs, and the Congressional appropriation power.

In *Planned Parenthood of Missouri v. Danforth*,[29] the Supreme Court recently struck down as unconstitutional a Missouri law which required that the consent of the husband be obtained before his wife could undergo an abortion unless the operation was necessary to save her life and that the consent of an unmarried minor's parents be obtained before she could receive an abortion. The Court made clear that it considered *Danforth* "a logical and anticipated corollary to *Roe v. Wade* and *Doe v. Bolton*."

In deciding that the State may not constitutionally require the consent of the spouse or a parent as a legal condition for obtaining an abortion, the Court in effect ruled that the right of the mother to abort her child is superior to that of the child's right to life, the right of the father to protect his child and that of the State to protect human life. Indeed, the decision in *Danforth* would suggest that the right of the woman to take the life of her unborn child through abortion is a constitutionally superior right to any other interest or combination of interests. Professor Francis Canavan summarized the Court's holding as follows:

> The only admissible object of public policy, in the Court's jurisprudence, is protection of the mother's untrammeled right to decide on the life or death of her child. The law may show no bias in favor of life, even if the male parent wants to preserve it, but must zealously safeguard the female parent's right to kill it. But this legal indifference is a specious neutrality: a legal system that refuses to have, or is not allowed to have, a bias in favor of life winds up with a bias against it.[30]

The Court's decision, however, reached beyond the issue of abortion and signaled a radical departure from traditional notions regarding the nature of the family. It marked the beginning of what could become a grave assault upon existing legal protection of marriage and the family.

The family as an independent institution within society, which in the past the State has sought to protect, simply was ignored by the Court in dealing with an issue which could only have a dramatic effect upon that relationship. In the Court's view, "nothing was involved but a conflict between individuals: wife v. husband, unmarried minor v. parent."[31] Citing *Eisenstadt v. Baird,* the Court stated that:

> . . . the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

This new constitutional standard leaves great doubt as to the constitutionality of much of the existing state regulation designed for the protection of the family. Indeed it is not unreasonable after *Danforth* to wonder whether the family does have continued legal existence, at least in those situations where an individual's action is sought to be limited to preserve the family unit. The treatment of marriage by the Court reflects a philosophy on the part of the Justices which views society as fundamentally atomistic. The radical autonomy and individualism of each citizen has displaced every other social institution except the power of the State.

The Court's opinion in *Danforth,* however, leaves unclear whether the right of the mother to bear her child is of equal superiority to her right of abortion. By substantially weakening the right of those who have traditionally protected the right to life in society, the Court's decision in *Danforth* when viewed in light of its prior holding on the abortion issue amounts to a questionable victory for individual liberty. In *Roe v. Wade,* Justice Blackmun wrote:

> . . . appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree . . . In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decision. The Court has refused to recognize an unlimited right to this kind in the past. . . *Buck v. Bell,* 272 U.S. 200 (1927).

The case relied upon by the Court in maintaining that the individual's freedom to control her own body is not an absolute right involved a young girl named Carrie Buck whom the state required to be sterilized under a law requiring the mandatory sterilization of mentally defective persons. The Supreme Court ruled that the state could require the girl's sterilization while Justice Oliver Wendell Holmes observed that in her family's situation "three generations of imbeciles are enough." The Court's reliance upon *Buck* surprised many constitutional scholars who thought that the opinion's viability as constitutional principle had long ago ended. This revival of the constitutionality of a state's use of coercive methods of birth control to implement a eugenics policy and reduce its public welfare expenditures perhaps foreshadows increased attempts by the State to mandate population controls.

The Court's opinion in *Danforth* results in the contradictory situation where the husband's objection to his wife's intended abortion is of no legal significance due to the current constitutional holding that the husband does not possess an interest in his unborn child and the child does not possess a right to life. Yet, in the situation where the husband does not agree with his wife's refusal to permit a blood transfusion to save the unborn child's life, he may petition the court to order such a transfusion on the basis of his interest in the child and supposedly also on the child's right to life.

**Federal Courts Claim Appropriation Power**

The right of the State to limit payments under its medicaid program to medically necessary abortions was not at issue in the *Roe v. Wade* and *Doe v. Bolton* cases. However, since those cases were decided, certain lower federal courts have held that such restrictions are unlawful.[32] These courts have in part held that the equal protection clause of the Fourteenth Amendment requires states which participate in the Medicaid program to pay for abortions that are not medically necessary. The basis of the courts' rulings is that the state violates the equal protection clause by discriminatorily dividing pregnant women into two classes and then treating each class differently. The decisions rest upon a decision by the court that there is no difference between the state's financing medically necessary procedures and financing those which are elective and nontherapeutic. The courts' decisions amount to a determination that if any medical assistance for pregnancy is to be paid, then all medical assistance — even that which is not necessary — must also be paid. These decisions rest on a misapplication of the equal protection clause. That consti-

tutional principle does not require that people in different situations be treated similarly. Treating welfare recipients who require medical assistance differently than those who want unnecessary treatment does not amount to a violation of the equal protection of the laws. These cases deal with two broad groups of patients: those who require medical treatment and those who simply request treatment that is not medically necessary. The women seeking abortions form small segments of each group; and the State action in denying medical treatment for nontherapeutic abortions is a result of a policy determination which applies equally to all recipients, including those requesting cosmetic surgery. Three of those cases are currently pending before the Supreme Court for a final determination of this issue.[33]

During 1976, the Congress adopted a limitation on the use of federal funds to pay for the performance of abortions under public welfare programs financed through the Department of Labor and the Department of Health, Education, and Welfare Appropriations Act. This limitation known as the Hyde Amendment resulted from a compromise of the proposal originally submitted by Representative Henry Hyde and stated that:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.[34]

Immediately upon the Hyde Amendment becoming law, an injunction was sought and granted in federal district court prohibiting its enforcement. Although suits seeking to enjoin the Hyde Amendment were filed in three federal district courts, only one granted a preliminary injunction barring enforcement of the limitation.[35]

Judge Dooling of the United States District Court for the Eastern District of New York entered an order enjoining the application of the Hyde Amendment and mandated the expenditure of federal matching Medicaid funds for non-medically necessary abortions just as before the enactment of the Hyde Amendment.[36] Judge Dooling ruled that the Hyde Amendment amounted to an unconstitutional denial of the equal protection of the laws to women seeking elective abortions. Although his memorandum accompanying the injunction order was less than clear in specifically anchoring the decision to constitutional principle and Supreme Court holdings, Judge Dooling did cite the prior decision of his court *Klein v. Nassau County Medical Center,*[37] in which he took part. There, the New York State Commissioner of Social Services ruled that "elective abortions not medically indicated" were not to be covered through New York's welfare program covered by Medicaid. In *Klein,* the federal district court

ruled that such a restriction was unconstitutional. This reliance upon *Klein* signified a confusion of the regulatory action of a state commissioner with an appropriation of Congress. The Hyde Amendment was incorporated into a one year appropriations measure. It did not adjudicate, nor did it regulate. It did not prohibit any act or activity. It simply refused to appropriate money to be used for a specific purpose. To equate the appropriation power of Congress with an administrative agency's regulation is to brush away the central issue presented by the case.

Senator James Buckley, Representative Henry Hyde and I intervened as parties to the New York suit on the grounds that as Members of Congress who voted for this limitation, we sought to protect this legislation from judicial nullification and to protect our interests as citizen-taxpayers. Like the Department of Justice, representing the Department of Health, Education, and Welfare, we argued essentially that the plaintiffs did not have standing to bring the suit since they could not show that the state welfare program would discontinue financing the performance of nontherapeutic abortions in the absence of federal reimbursement. Specifically, the State of New York was already under a federal court order to provide such funding whether or not federal funds were available. However, we entered the case to put forward the independent argument that Article I, Section 9, Clause 7 of the Constitution grants to Congress the exclusive power of appropriation and that a judicial invalidation of the Hyde Amendment would amount to a judicial appropriation of funds in violation of the Constitution. Such an order could only amount to an unlawful attempt to appropriate funds from the Treasury which could not be sustained. We argued that in adopting the Hyde Amendment, "Congress made one inescapable fact absolutely clear: It was not appropriating, it refused to appropriate, any federal funds for elective abortions. In brief, there has not been, and there is not now, any appropriation for the period October 1, 1976 through September 30, 1977, or funds for elective, non-medically dictated abortions. It is beyond the competence of any court, state or federal, to sit in judgment respecting the wisdom of Congress when Congress refuses to make appropriations."[38]

It was also evident to us that if a federal court could judicially appropriate money to subsidize a woman's right to have a nontherapeutic abortion, then the federal judiciary would soon be asked to require that other constitutional rights also be subsidized by the Federal Government. A decision invalidating the Hyde Amendment could only open the door to a radically new function for the federal

judiciary and, as such, would constitute a substantial injury to the authority of Congress and the separation of powers doctrine.

### A New Abortion Mentality

Recently, the impact of these court decisions was brought sharply into focus by a report by the District of Columbia that abortions among residents during 1975 in that city for the first time exceeded births.[39] And that approximately 85% of those abortions were performed at government expense through either the city's free public hospital or the Medicaid program. Dr. Louis Hellman of the Department of Health, Education, and Welfare has estimated that the Department is currently financing between 250,000 and 300,000 abortions annually at a cost of $45 to $50 million.[40] Elsewhere, it has been estimated that about 275,000 unmarried teenagers obtained abortions during 1974, many of which were financed through the Medicaid program.[41] The Center for Disease Control in Atlanta reports that the national abortion ratio increased from 6.3 per 1,000 live births in 1969 to 241.6 in 1974, the latest year for which national figures are available.[42]

One major consequence of the Abortion Cases is that the practice of abortion has shifted from one used essentially as a last resort, in the so-called hard cases, to a primary means of family planning. In fact, certain studies indicate that abortion on demand will replace other methods of family planning. For example, a study of the abortion trends at Harlem Hospital Center in New York City by members of its own Obstetrics and Gynecology Department found that in the years 1962 throught 1969, the number of abortions declined from 1,581 in 1962 to only 507 in 1969, the year before the implementation of the liberalized New York abortion statute. During the same time period, the number of family planning visits made by residents of the area increased from none in 1962 to 15,982 in 1969. The study itself concluded that "as family planning services expanded in our hospital and area, the number and severity of abortion cases declined significantly."[43] Another study of abortion in Hawaii, the first state to adopt abortion on demand, found that most of the women obtaining abortions under the new statute "were using it as a primary means of birth control, rather than as a backup to failed birth control."[44] This dramatic upsurge in the number of abortions indicates the emergence of a new abortion mentality. Elsewhere, it has been suggested that this "abortion mentality is a dangerous communicable disease — one that spreads throughout a country once the abortion laws have been liberalized."[45] The symptoms of this

social disorder consist of a swift increase in the abortion rate, the acceptance of abortion as a commonplace medical procedure of no more gravity than other means of family planning, and finally the subsequent decline in respect for human life. This new abortion epidemic is nothing less than "a revolution against the judgment of generations."[46]

Professor John Noonan has outlined the principal consequences of the Abortion Cases as follows:

> First, the subversion of the structure of the family is that a father now has no protectable legal interest in his unborn offspring; second, the mandated public funding of abortion; so it is unlikely that a national health bill can be enacted, which constitutionally excludes abortion from the surgical services to be federally financed; and third, and worst of all, the unmaking of human beings, the acceptance of the principle that the law can say who is not a human being. All of our constitutional liberties are nothing if we can be defined out of the human species.[47]

## *V. A Constitutional Amendment is Necessary*

Congress can respond to the abortion cases in one of three ways. Article III, Section 2, of the Constitution authorizes Congress to regulate the jurisdiction of all Federal courts, including the Supreme Court. By ordinary legislative action, Congress could, therefore, withdraw Federal jurisdiction in all cases involving abortion statutes and allow State supreme courts to be the courts of final jurisdiction. However, this would only provide an incomplete remedy, since all prior federal court decisions would remain in force as precedent; and some state courts could be expected to adopt the reasoning of the Supreme Court in its abortion decisions and, therefore, thwart the primary reason for withdrawing Federal jurisdiction. Still, this proposal should be seriously considered as a practical first step toward protecting human life.

Congress also has the power to enforce the Fourteenth Amendment by appropriate legislation. The suggestion has been made that Congress should, therefore, reverse the abortion decisions simply by enacting a statute defining the word "person" in the Fourteenth Amendment to include the child in the womb. Again, this would be only a partial remedy and would possibly be subject to judicial veto. The Supreme Court, for example, might rule that such a statute was unconstitutional on the theory that a child in the womb was inherently incapable of personhood under the Fourteenth Amendment.

For these reasons, a constitutional remedy through the amend-

ment process is the only course of action to provide the fullest protection of human life. It is a more difficult and time-consuming method of redress, but it has the virtue of ending all doubt about the constitutional issues of personhood and abortion. It would allow the American people to declare for themselves their opposition to the widespread practice of abortion, and their dedication to the principles of "life, liberty, and the pursuit of happiness."

Following our Bicentennial Celebrations, nothing would be more appropriate than a Twenty-Seventh Amendment to our Constitution declaring our allegiance to the ideal of the sanctity of human life promulgated two hundred years ago in our Declaration of Independence.

## *VI. Which Amendment is Necessary?*

A constitutional amendment must be worded, like the Constitution itself, in terms of general principles. It is not a criminal code and should not be drafted in the detailed language of such a code in anticipation of every possible evasion or situation.

With this consideration in mind, I have proposed a constitutional amendment, Senate Joint Resolution Number 6, which provides as follows:

> Section 1. With respect to the right to life guaranteed in this Constitution, every human being, subject to the jurisdiction of the United States, or of any State, shall be deemed, from the moment of fertilization, to be a person and entitled to the right to life.
>
> Section 2. Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.[48]

A number of other proposed constitutional amendments attempting to restore the right to life have been offered to remedy the Supreme Court Abortion Decisions. I, myself, offered amendments during the 93rd and 94th Congresses. Since then, the Senate Subcommittee on Constitutional Amendments and the House Subcommittee on Civil and Constitutional Rights have held extensive hearings on many aspects of this complicated problem. I testified before the Senate Subcommittee and spoke out on several occasions indicating that I was putting forth my amendments to stimulate discussion and criticism, and that they were not necessarily final drafts. After much reflection upon the differing criticisms that were brought out against the wording of my original proposal and against that of other amendments submitted, I am now persuaded that this amend-

ment is a great improvement over every other proposal that has been considered. I firmly believe that it is an amendment which all Americans can unite behind in the common effort to end the destruction of innocent human life in the United States.

Today the primary threat to the absolute sanctity of human life is abortion. However, one should not expect that by the time the long process of ratification is completed, abortion will remain the central threat to the sanctity of human life. It is very possible that besides abortion, euthanasia, eugenics, human experimentation, and other problems resulting from future scientific developments will equal or surpass abortion as a threat to human life. Therefore, it is necessary that whatever amendment is adopted be one that protects human life in the most complete sense and not one limited exclusively to the problem of abortion.

It has been suggested that a constitutional amendment which removes federal court jurisdiction from the issue of abortion and allows the states to be the final arbiter on the subject is the most desirable resolution of the abortion controversy. Such a proposal is deficient in several aspects. Essentially, such an amendment will not answer the central issue of the abortion debate — are we as a nation going to legally protect unborn human life? The so-called States' Rights Amendment establishes as a constitutional principle that the intentional destruction of innocent human life is legally proper since it would permit the adoption of state statutes consistent with the Supreme Court decisions. This is not a compromise of the pro-life and pro-abortion positions. It is in fact the adoption of the pro-abortion position. Secondly, such an amendment is not broad enough to include other problems concerning the value of human life in American society which may indeed surpass abortion by the time such an amendment is ratified.

On the surface, it would appear to be an attractive and easy solution to turn this problem back to the States. Yet, it is simply wrong in principle to subject the right to life of innocent human beings to the variant determinations of different legislatures. The right of innocent life is inviolable. And it is indivisible. Moreover, the situation today is not the same situation as before the Supreme Court acted. Despite the due process and equal protection clauses of the 14th Amendment — which would seem on their face to protect the lives of all persons — the Court attacked the rights of the unborn by narrowly defining "person." The States' Rights Amendment does not disturb the Supreme Court's decree that the unborn child is a non-person. Since the States' Rights Amendment does not overrule the

Supreme Court rationale that the child in the womb is a nonperson, there is nothing in such an amendment to prohibit a State court from adopting the reasoning of the Supreme Court to reach the same conclusion. It is likely that a State court would consider itself at least implicitly bound by that Supreme Court interpretation of what due process means. The State court, therefore, would conclude that the child in the womb is a nonperson under the due process clause of the State constitution, just as he is now a nonperson under the 14th Amendment. Since the unborn child is a nonperson, the State court might very well conclude that a State law restricting abortion would infringe the mother's right of privacy and would therefore be invalid as a violation of the due process clause of the State constitution.

Furthermore, it can be argued that State supreme courts are under an obligation to enforce the United States Constitution and the principles of constitutional law articulated by the Supreme Court. Article VI, Clause 2 of the Constitution states that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

The Supremacy Clause mandates that state courts follow not only the Constitution, but its meaning as interpreted by the U. S. Supreme Court.[49] Often state courts have even determined that they are bound by the decisions of lower federal courts as well.[50] Even when a state court rules that it need not follow the ruling of a federal court, it may still give such opinions some consideration as legal authority. Often federal court rulings will be found "persuasive and entitled to great weight."[51]

Since a States' Rights Amendment would have no effect upon prior decisions of the Supreme Court and federal judiciary, the rules outlined in *Roe v. Wade* and *Doe v. Bolton* would be binding under the Supremacy Clause upon state courts. Although the state court of highest jurisdiction would be the final arbiter of this matter and appeal could not be taken to the U. S. Supreme Court, a state court would still be under compelling pressure to abide by the rulings in the *Roe* and *Doe* decisions.

Those who favor abortion would have every reason to support the States' Rights amendment. Those who believe that the killing of the unborn is incompatible with our constitutional freedoms would be bitterly disappointed if the amendment became law. By failing to overturn the truncated definition of person set up in *Wade,* such an

amendment would leave the Supreme Court's doctrine permanently engrafted in our constitutional law, with its implications against the lives of the unborn, the aged, and the incapacitated.

No decision of the Supreme Court since the *Dred Scott* case has so profoundly affected American society as have the Abortion Cases. And just as American society refused to exist as half slave and half free, it will not accept the position that it exist where the sanctity of human life is protected in some states and threatened in others. The American people will not accept a second Missouri Compromise in regard to the right to life.

## *VII. Personhood*

The essential purpose of any human life amendment is to insure that all human beings enjoy the protection of the right to life. This can be accomplished by establishing the principle that all human beings are considered "persons" with respect to the right of life under the protective Due Process Clause of the Fifth and Fourteenth Amendments.

The Supreme Court itself directs us to this point in *Roe v. Wade* where the Court states:

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the amendment.

If personhood is established by a constitutional amendment, then the Supreme Court itself admits that the right to life of the unborn child will be protected.

It is important that the beginning of life, and therefore the beginning of the constitutional protection of that life, be defined with precision and clarity by any proposed amendment. Our scientific knowledge today is sufficient to provide such a definition. To be consistent with that knowledge, the amendment language must not be so loose or general that the way is opened for arguments that the period of protected life should be shortened for the sake of convenience. On the other hand, it is not necessary to encumber the unborn child with all of the constitutional rights of an adult. The Human Life Amendment's essential intended purpose is limited to the right to life.

The substance of my amendment is that it makes the unborn child a person only "with respect to the right of life guaranteed in this

constitution." Thus, only the right to life becomes a constitutional right. Other rights could be assigned to the unborn by legislation or judicial interpretation, as seen by the large body of law on inheritance and tort claims. But such laws are not mandated by my amendment. The amendment would allow for the further development of laws consistent with pre-*Wade* judicial thinking. For example, Dean William Prosser summarized the tort law regarding the unborn child's right to recover for an injury sustained before birth as follows:

> So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. . . So far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are no more frequent, and the difficulties are no greater, than as to many other medical problems. All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof.[52]

At the same time, it is clear that an unborn child under my amendment would not be subject to census, registration, passports, taxation, and other such requirements imposed upon residents of the United States. Our laws take notice of the age of citizens and make reasonable distinctions based upon such considerations. For example, broad distinction is made between adults and minors; and even minors are subdivided according to mental responsibility. Yet, all enjoy the fundamental right to life which is just as reasonably accorded to the born and the not yet born.

## *VIII. When Human Life Begins*

My amendment clearly states that life begins at the moment of fertilization. The word "fertilization" has been specifically employed because it is more precise than the word "conception," which in common parlance is often used interchangeably. "Conception," however, is a word whose use and associations antedate our scientific knowledge. In certain pro-abortion circles, an effort has been made to equate conception with implantation. The Supreme Court itself referred sympathetically in the abortion cases to "new embryological data that purport to indicate that conception is a 'process' over time, rather than an event." To stop early as well as late abortions, the amendment's protection must apply from the moment of fertilization. It is true, of course, that many fertilized ova are never implanted. But rather than suggesting that "implantation" be adopted as the

constitutional standard, this fact is merely evidence of the reality that a human being can die at any time in his life span.

In seeking to protect human life, the amendment language must relate to our present scientific knowledge. Although the amendment's protection is in part dependent upon the accepted findings of science, the determination of when human life should be constitutionally protected cannot be left to depend totally upon a scientific judgment. In arriving at the determination of when human life should be legally safeguarded, the word "fertilization" is the most scientific and unambiguous one that can be employed while still maintaining the greatest legal protection. The biological evidence clearly establishes that the fertilization of the egg is the beginning of human development. Gideon Dodds writes in his textbook, *The Essentials of Human Embryology,* that the "fertilized egg is the beginning of a new individual."[53] Jan Langman states in his book, *Medical Embryology,* that "the development of a human being begins with fertilization."[54] The fertilized ovum is genetically complete and independent of the mother. Professor Jerome LeJeune observes in *Ethical Issues in Human Genetics* that "if a fertilized egg is not by itself a full human being, it could never become a man, because something would have to be added to it, and we know that does not happen."[55] The human life that begins at fertilization is a continuum, unbroken at any point by radical change. William James Hamilton states in his textbook, *Human Embryology,* that "there are no essential differences between prenatal and postnatal development; the former is more rapid and results in more striking changes in shape and proportions; but in both, the basic mechanisms are very similar if not identical."[56]

The word "moment" in the amendment makes it clear that a given point in time is legally established. If the language of the amendment should allow for a "process of development" standard, then an interpretation of that language could set any point in that process, such as implantation, "viability," or even birth, as the point at which the protection of life begins. Indeed a court implementing that language would be forced to judicially determine at what stage in the process of development legal protection would be granted. It is simply not enough to protect each person at every state of his biological development unless we know with certainty at what stage human development begins.

## *IX. Abortion to Save the Life of the Mother*

Once the principle of the primacy of life of every human being

has been established, the problem will arise of the so-called hard cases in which pregnancy places the life of the mother in danger. Today, such cases exist as medical rarities. Although convincing evidence indicates that abortion is no longer medically required in these cases, it would be unfortunate to amend the Constitution in such a way that a doctor attempting to care for his patients is placed in legal jeopardy. It would also be unfortunate to amend the Constitution in such a way that an exception clause to provide for these hard cases would allow widespread abuse under the cover of law. The resolution of this problem has been a principal aim of my amendment.

My amendment contains no specific exception clause because such a clause is not necessary. As the amendment is presently drafted, the difficult cases can be handled under traditional concepts of due process and equal protection of the laws.

State criminal laws have long recognized the legal principles of self-defense and necessity or choice-of-evils without their specific incorporation into the Constitution. Certainly, they form a part of the American legal tradition which predates the Constitution itself. At times these doctrines have been held to be contained within the due process clause of the Constitution; but the silence of the Constitution on these principles has not detracted from their vitality. There is no reason to suppose that a similar resolution of the propriety of procedures to save the life of the mother would not be developed by the States.

Although this amendment definitely prohibits abortions in every case where the mother's life is not at stake, it is not intended to invalidate future laws in the states which permit procedures to save the life of the mother.

This amendment leaves the difficult cases to be determined by an even-handed application by the courts and State legislatures of constitutional principles applying to all human beings. It establishes the basic life principle, that the destruction of the child in the womb is a violation of every human being's constitutional right to life. The amendment would, however, insure equal protection. Nor is it intended to prevent state legislatures and courts reviewing state laws from continuing to regard abortions to save the life of the mother as a matter of self-defense and therefore legally justifiable according to the general principles of self-defense that apply to all human beings. The amendment takes cognizance of substantive due process as it has been developed in Anglo-Saxon jurisprudence. Although the amendment does not encourage exceptions, it admits to exceptions in the

light of legal precedents, such as "the doctrine of necessity," established in rare and unusual circumstances.[57]

Not every abortion, of course, results in the death of the child; controversies are in the papers daily about the efforts or lack of efforts to insure the survivability of such children outside the womb. For example, a recent survey of major medical centers by the Washington *Post* discloses that premature babies weighing under two pounds at birth now have more than a sixty percent chance of survival.[58] The University of Colorado Medical Center reports that sixty-six percent of the babies born there at 27 to 28 weeks of age are surviving as compared with two years ago when the survival rate was only ten percent. Dr. Watson Bowes, chief of obstetrics and gynecology at the Colorado Center attributes this development to a change in attitude on the part of doctors caring for these infants. In the past, he said, ". . . We felt there was so little chance of a baby [so small] surviving that we didn't put any effort into it. These were cases that we felt we were going to [in effect] abort. [Today] we are being more aggressive. We're doing things for these tiny, little babies that we've always done for the bigger babies." Reports from other hospitals confirm that this apparent breakthrough in survival rates for premature infants is not the result of new developments in medical technology, but "because obstetricians are beginning to realize that they can survive, and are expending the same effort to save these tiny babies that they expend to save an infant born at full term." Although this study is certainly not conclusive, it does strongly suggest that the medical evidence relied upon by the Supreme Court in its Abortion Cases is now out of date.

Indeed, this new ability to save such premature babies leads to the further question of whether the abortion procedure must terminate a pregnancy by causing the death of the child. Dr. Andre Hellegers, director of the Kennedy Institute for the Study of Human Reproduction and Bio-Ethics, raises the central question regarding later term abortions:

> In the process of abortion do you assume that the mother has a right to the death of the fetus; or is abortion only to be seen as a process of separating the mother and the fetus in the resolution of a conflict of interest.[59]

My amendment would be consistent with state laws permitting the premature termination of a pregnancy where the life of the unborn child is not threatened by such a procedure.

Opposition to the Human Life Amendment often rests upon the assumption that anything less than abortion on demand will result in an epidemic of abortion-related maternal deaths. For example,

estimates that five to ten thousand women died each year from illegal abortion before the Abortion Cases are frequent. However, studies of the problem have reached different conclusions. Dr. Alex Barno reported in a study of Minnesota cases that if the ten thousand figure were correct, Minnesota's share would be 200 per year.[60] Instead, the average number of deaths in Minnesota due to criminal abortions during the study period was 1.3 per year. If this number were projected to the country as a whole, the average number of illegal abortion deaths would be 65 per year. This projection is relatively consistent with the finding of the Center for Disease Control in Atlanta which reported that forty-eight women died of complications of abortion in 1974 — the most recent year for which figures are available. Legal abortions accounted for twenty-four of those forty-eight maternal deaths, spontaneous abortions for eighteen deaths, and illegal abortions for only six deaths.[61] The specter of an epidemic of maternal deaths due to illegal or "backroom" abortions is simply unfounded.

Neither does abortion on demand reduce maternal deaths. The number of maternal deaths from abortion has steadily declined from 1942 when there were 1,231 abortion related deaths. By 1962, when the American Law Institute's Model Penal Code was proposed with its abortion on request provisions, but before it had been adopted by any state, maternal deaths were reduced to 305 for the year. In 1967, the year preceding the first major liberalization of state abortion laws, maternal deaths had been reduced to 160. And during the period of 1968 through 1971, that is during the period when liberalized abortion laws adopted by sixteen states became effective, the number was reduced from 133 deaths in 1968 to 122 in 1971.[62]

### States Will Determine Exceptions

The question of to what extent the Human Life Amendment would allow medically necessary procedures to save the life of the mother is one of constitutional and criminal law. However, the question of which circumstances give rise to the exception is one of fact to be determined by state legislatures, courts, and medical communities.

Some in the medical community maintained in the past that there were far more medical situations necessitating abortion to protect the mother's health than exist today. With the recent developments in medical procedures concerning such threatening conditions and the tendency to treat the unborn child as a patient, the necessity for abortion has been greatly reduced. I am not an expert in the field,

and would not venture to say that the evidence is conclusive, but the evidence does show that medical science has all but eliminated the necessity for abortion.

For some time, pregnancy was thought to be a great risk to patients suffering with heart disease; yet, recent advances in treatment make "therapeutic abortions due to heart disease now rare compared to twenty or thirty years ago."[63] Today, some experts maintain that "any patient with heart disease seen early enough to be aborted was seen early enough to be carried successfully through the pregnancy if she would abide by certain rules."[64] Renal, that is kidney, disease is sometimes listed as a justifiable reason for abortion. Hereto, developments in treatment, namely with antibiotics, have substantially reduced abortion in these circumstances. For patients suffering from severe or progressive kidney deterioration, the effects of pregnancy on the disease *may* aggravate that deterioration; and hence, abortion has been recommended by some physicians.[65] Pulmonary tuberculosis was once considered an indication for abortion; however, "pregnancy does not affect the course of the disease, nor is the course of the disease improved by abortion."[66] Today, tuberculosis is no longer a reason for abortion. The effect of pregnancy upon various forms of cancer or diabetes is still unclear, and further study is needed to determine whether abortion is really medically indicated in these situations. However, some types of cancer mandate the removal of the uterus and hence the fetus. Neurologic diseases, such as multiple sclerosis, epilepsy, and muscular dystrophy are "sometimes made worse by pregnancy." As a general proposition, their effect is still considered unpredictable. There is insufficient evidence to conclude that these diseases increase the woman's risk during pregnancy.[67]

Presently, there is general agreement in the medical community that removal of the fetus is indicated in cases where the fetus is dead or has been reabsorbed, where cancer or a tumor necessitates the removal of the uterus, and where implantation has occurred outside the uterus, as in an ectopic pregnancy. Although some of these cases require procedures to terminate a pregnancy, they are not usually considered as abortions.[68] For example, an ectopic pregnancy is usually treated as an emergency requiring major abdominal surgery.

Psychiatric or emotional disorders have in the past been cited as reasons for abortion. Presently, the weight of scientific authority indicates that such disorders do not require abortion as a solution. For example, Dr. Samuel Nigro, professor of psychiatry at Case Western Reserve University School of Medicine, writes that "There

are no clear-cut psychiatric indications for therapeutic abortion."[69] Dr. Irving Bernstein, professor of psychiatry at the University of Minnesota Hospital, states that "from the . . . point of view of the psychiatrist, there are no indications for recommending therapeutic abortions."[70] He summarized his testimony before the Senate Subcommittee on Constitutional Amendments as follows:

> In summary, there are no psychiatric indications for therapeutic abortion because (a) therapeutic abortion is not effective treatment for the patient or for the situation; (b) abortion will not solve the "battered child" syndrome problem; (c) suicide is less of a risk in pregnant women than in non-pregnant women; (d) it is impossible to predict who will develop a post-partum psychoses; (e) therapeutic abortion has its own psychiatric morbidity; (f) adequate treatment methods are available to handle psychiatric difficulties occurring during pregnancy.[71]

Many physicians find that there are no medical conditions which require abortion as a treatment. Since none of these conditions can be improved or cured through abortion, they maintain that this procedure results only in the death of the unborn child with no medical benefit to the mother. Dr. Roy Heffernan of Tufts University has stated that "anyone who performs a therapeutic abortion is either ignorant of modern medical methods or unwilling to take the time and effort to apply them."[72] Dr. David Wilson maintains that "proper management will permit a successful termination of pregnancy regardless of the physical and mental diseases of the patient."[73] Even such a steadfast proponent of abortion on demand as Alan Guttmacher states that "it is possible for almost any patient to be brought through pregnancy alive unless she suffers from a fatal illness such as cancer or leukemia; and if so, abortion would be unlikely to prolong, much less save life."[74]

**Abortion Is Dangerous to the Mother**

Alongside the social and legal consequences of abortion, the individual medical and psychiatric consequences of the procedures are also hazardous. Whatever personal advantages some may claim for abortion, the serious consequences of the procedure very often offset any claimed benefits. One leading gynecologist states that "there is now ample evidence to show that abortion is neither safe nor simple. The long-term complications alone condemn its use as a contraceptive method."[75] Another study of the long-term effects finds that:

> Especially striking is an increased incidence of ectopic pregnancy. Furthermore, as noticed recently, a high incidence of cervical incompetence

> results from interruption of pregnancy that raises the number of spontaneous abortions subsequently to 30-40 percent.[76]

A British study of the effects of abortion on subsequent pregnancies recommended that: "Any patient who has a previous history of an abortion should be regarded as a high risk patient."[77]

The psychological complications resulting from abortion are also significant. The Scientific Study Group of the World Health Organization reports that there is "no doubt that the termination of pregnancy may precipitate a serious psychoneurotic or a psychotic reaction in a susceptible individual."[78] Other studies find that abortion "even if therapeutic, may in itself produce a psychosis" and that abortion "frequently carries with it a degree of emotional trauma far exceeding that which would have been sustained by continuation of pregnancy."[79]

Professor Alfred Kotasek, Chief of the Department of Gynecology and Obstetrics at Charles University, Prague, Czechoslovakia, reported to the Fourth International Congress on Perinatal Medicine in 1975 that the medical complications following first trimester abortions were: (1) immediate complications: death, excessive blood loss, injuries to the cervix, perforation of the uterus; (2) early complications: fever, bleeding, retained products of conception, infection, "the postabortal pain syndrome"; (3) late complications: chronic inflammation, menstrual disorders, psychological complications, sterility; (4) complications during subsequent pregnancy: extra-uterine pregnancy (eg. ectopic pregnancy), cervical incompetence (spontaneous abortions), perinatal mortality (still birth), premature births, hemorrhage during pregnancy, longer average duration of labor. Professor Kotasek also reports that mid-trimester abortion is "three to four times more risky than early abortion."[80]

Although the Human Life Amendment would allow a resolution of the problem of a pregnancy threatening the life of the mother consistent with traditional legal and ethical thinking, it would not allow abortion for purposes of eugenics or euthanasia. "Fetal euthanasia" is sometimes advocated as a solution to Tay-Sachs disease or when the mother has had rubella in early pregnancy. Dr. Watson Bowes of the University of Colorado Medical Center has observed that such a proposal amounts to "treating a disease by killing the patient with the disease."[81] Some have described abortion in these circumstances as nothing less than euthanasia. But the practice of abortion in these cases is substantially different from the practice of euthanasia. Here the life of the patient is terminated not because he is in great pain or has contracted a fearful, terminal disease, but

only because it is probable or even just possible that he *may* contract the disease. Often, perfectly normal and healthy children are aborted for no more reason than that they might inherit a disease or condition. For example, one study of "therapeutic" abortions done because the mother had contracted rubella during pregnancy "found no evidence of the disease in 32 percent" of the unborn children, while others who had the disease would have recovered and been born normal.[82]

According to Jerome LeJeune, professor of genetics at the Medical College of Paris, France; Tay-Sachs disease could be prevented entirely by simply discovering which people carry that specific genetic trait and encouraging them not to marry a person with the same trait.[83] That certainly would be a more humanitarian solution to the problem than killing unborn children suspected of having the disease.

An exception clause contained in the Human Life Amendment to provide for the legalization of abortion in the case of rape is both unnecessary and unenforceable. After the proper and normal medical treatment for rape has been obtained, the possibility of pregnancy is nonexistent.[84] And even when the woman has not received treatment a number of medical studies of pregnancy resulting from untreated rape found that such pregnancies are exceedingly rare.[85] Studies of the actual number of pregnancies resulting from rape in several American cities indicate that, as a practical matter, the problem does not exist. A 1969 study of pregnancies resulting from rape in Buffalo, New York found that there were no pregnancies from confirmed rape in over 30 years.[86] A study of 3,500 cases of rape in Minnesota also reported no resulting pregnancies.[87] Dr. Carolyn Gerster observes that there are two irrefutable arguments against making an exception in the case of rape:

> (1) Pregnancy from reported, medically treated rape is zero — rendering the exception clause unnecessary. (2) Unreported rape — after all evidence of penetration has disappeared and without corroborating witnesses — cannot be proved rendering the law unenforceable.[88]

I hope as a consequence of this prohibition of abortion in cases of rape, victims will be encouraged to seek medical attention and report offenses, thus reducing the great number of estimated cases which go unreported. I hope too, this increased attention will lead to improvements in society's treatment of the rape victim. A society which promotes justice, as well as compassion, will support more severe penalties for the rapist and more humane treatment for his

victim rather than encourage the killing of the innocent child conceived during the criminal act of another.

## *X. State and Federal Jurisdiction*

Upon adoption of a Human Life Amendment, the Federal Government would not preempt the power of States to prohibit abortion, prescribe penalties, or regulate abortion procedures and facilities. States would continue to act in the fields of State interest. Section Two of my amendment preserves the concurrent jurisdiction of Congress and the States over abortion and recognizes the fact that the regulation of abortion is primarily a State responsibility.

The Federal Government could act to outlaw interstate commerce in drugs, instruments, and equipment used for abortions, as well as the use of interstate commerce to procure an unlawful abortion. However, any Federal action promoting abortions, including funding of actual abortions, use of Federal facilities or personnel, and research on abortions, particularly research that involves clinical testing, would be clearly a violation of the constitutional rights of the unborn.

The States in turn would have similar powers in regulating abortions under their criminal codes. They would again have the power to delineate spheres of culpability with regard to those who participate in abortions. They would have the authority to prescribe penalties and enforce criminal statutes against abortion.

Although the Human Life Amendment requires that abortion done for reasons other than to save the life of the mother be treated as a serious crime, it does not require that such abortions be considered as first degree murder. Since abortion is the taking of a human life, it would constitute a homicide. However, just as State criminal codes treat different types of homicides differently, the States would be able to grade the crime of abortion on the basis of the circumstances accompanying the act, such as the intent of the mother, her emotional situation, and other relevent factors. Whether the killing of an unborn child is to be treated as an offense equal to that of killing a child after birth is a legislative judgment. And nothing contained in the Human Life Amendment would prohibit treating these acts as different degrees of homicide. As Professor Robert Byrn has stated, "The purpose of a Human Life Amendment is not to legislate degrees of homicide, nor will that be its effect."[98]

## *XI. Euthanasia*

There is little doubt that the Supreme Court's ruling in the abortion cases raises the specter of euthanasia. If by judicial mandate, persons exist only at birth, then another majority of the Court can establish the principle that a person ceases to exist on account of age, illness, or incapacity. The Supreme Court itself has made the realistic possibility of such a conclusion inescapable through the use of the "capacity of meaningful life" standard and the reference to the unborn child as less than a "person in the whole sense" in the *Wade* opinion.

Until recently, American law forbade euthanasia by considering it as the active intervention to terminate life and therefore as an unlawful homicide. Encouraged by the abortion cases, proponents of euthanasia are intensifying their efforts to change the law on a national level. Already attempts have been made in some States to establish a form of voluntary euthanasia, the idea being that a person should have the liberty to decide when to die. Recently, the New Jersey Supreme Court held that the life support systems of a comatose patient could be lawfully terminated if the attending physician and the hospital ethics committee agreed "that there is no reasonable possibility of (the patient's) emerging from her present comatose condition to a cognitive, sapient state."[90] Citing *Eisenstadt v. Baird, Griswold v. Connecticut* and *Roe v. Wade,* the Court held that there was a constitutional right to end any "artificial life-support systems as a matter of self-determination." The Court further ruled that this new right of self-determination "should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice."

The ruling of the New Jersey Supreme Court is even more surprising when considered in light of the findings of fact made by the lower court. That court held that the patient under consideration "is by legal and medical definition alive" and that to remove the life support systems would under the law of New Jersey amount to homicide. The attending physician testified that due to the absence of a pre-hospital medical history and to the fact that other patients have survived longer coma periods, and even though he could not say how his patient's condition could be reversed, he was unwilling to state that it was an irreversible condition. He also concluded that to shut off the respirator under these circumstances would be "a substantial deviation from medical tradition" that it would be based on a so-called "quality of life" test and that he would not do so.

In 1976, California adopted a so-called "Natural Death Act" which authorized the withholding or withdrawal of life-sustaining procedures from adult patients in terminal condition who had executed a directive authorizing such action.[91] This legislation relieved health professionals and facilities from civil liability and criminal prosecution for actions made pursuant to the patient's directive. Although different procedures may exist under various legislative formulations of the "living will" concept, a number of substantial legal problems still may be expected to attend such laws including the one adopted by California. Medical personnel under the California formulation are relieved of liability irrespective of whether the doctor acts in bad faith or in a grossly negligent manner. If the patient has signed the authorizing directive, the doctor must terminate life sustaining procedures or transfer the patient to a doctor who will. If he fails to act promptly, there is a possibility he may face legal action. In short and most importantly, the doctor, in attempting to comply with the requirements of the California Natural Death Act and, one suspects, under any "living will" formulation, can only be penalized if the patient lives, but not if the patient dies. The Act also excludes members of the patient's family from the life or death decision.

From this point, it is not a long distance to the argument adopted in the Quinlan case; namely, that euthanasia should be extended to include those who cannot communicate their desire to die. Eventually, we shall arrive at the final stage where "undesirables," such as the sick, the aged, the senile, and the retarded are eliminated — not because they want to die, but because they would want to if they knew what was good for them. As outlandish as this may sound today, it is nevertheless a foreseeable problem because of the language and the new concept of liberty in the Supreme Court abortion decisions.

Professor Charles Rice has observed that "an acceptance of the basic error that there is such a thing as a life not worth living can only end in involuntary elimination of the worthless ones. Once the basic fallacy is adopted, the tendency is to slide into involuntary elimination of the aged, the helpless, and finally the socially or politically undesirable. The lesson of Nazi Germany is indelibly clear on the point. The mass exterminations there began with incurable physical or mental illness."[92]

History is replete with examples of where such reasoning has led in the past. One observer commented on the German experience under the Nazi regime as follows:

> . . . The beginnings at first were merely a subtle shift in emphasis in the

> basic attitude of the physicians. It started with the acceptance of the attitude basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted, and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the non-rehabilitable sick.[93]

One State Supreme Court has already adopted the proposition that other human beings have a legal right to decide when someone's life should be terminated. This is a principle that we can never finally admit to in our society. It is indeed the same principle involved in the destruction of the unborn. In anticipation of these developments, my amendment recognizes that the right to life is a broad right that cannot be abridged on account of age, illness, or incapacity. By providing that every human being is a person, from the moment of fertilization and is entitled to the right to life, this amendment protects all persons against euthanasia.

## *XII. Conclusion*

An amendment to the Constitution is not something to be undertaken lightly, or to be interposed every time one is dissatisfied with a decision of the U. S. Supreme Court. But we are dealing here with an issue so basic and so essential to our rights that it cannot be sidestepped without drastic impairment to the whole range of our freedoms and responsibilities as embodied in the Constitution. As Professor Archibald Cox observed in his recent work on the Supreme Court, its abortion decision "fails even to consider what I would suppose to be the most important compelling interest of the State in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of Western civilization."[94] The right to life is the very precondition of all our other rights. If the right to life is diminished or restricted, every other right is open to attack. If we wish to preserve our fundamental American freedoms, then the right to life must be inviolable.

### NOTES

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2. 410 U.S. 179 (1973).
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4. G. Grisez, *Abortion: The Myths, the Realities and the Arguments.* (New York: Corpus Books, 1970), p. 306.

5. S. Ervin and R. Clark, *Role of the Supreme Court: Policymaker or Adjudicator?* (Washington, DC: American Enterprise Institute, 1970), p. 13.

6. *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).

7. Senate Hearing pt. 4 at 526.

8. Cited in *Id.*

9. J. Noonan, "Why a Constitutional Amendment?," *The Human Life Review,* Winter 1975, pps. 27-28.

10. H.O.J. Brown, "What the Supreme Court Didn't Know," *The Human Life Review,* Winter 1975, p. 6.

11. L. Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation.* (Baltimore: Johns Hopkins Univ. Press, 1943). p. 3.

12. *Exodus* 21:22-23; see also Jakobovits, "Jewish Views on Abortion," in *Abortion, Society, and the Law.* D. Walbert and J. Butler, eds. (Cleveland: Case Western Reserve Univ. Press 1973), p. 103; also reprinted in *The Human Life Review,* Winter 1975, pp. 74-84.

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19. R. Byrn, "An American Tragedy: The Supreme Court on Abortion," 41 *Fordham Law Rev.* 807 at 833 (1973).

20. *Id.* at 828.

21. *Id.* at 835-36.

22. Senate Hearing, pt. 3 at 217.

23. J. Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 *Yale Law Rev.* 920 at 947 (1973). Also reprinted in *The Human Life Review,* Winter 1975, pp. 44-73.

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25. *Id.*

26. R. Byrn, "The Abortion Amendments: Policy in the Light of Precedent," 18 *St. Louis Law Journal* 380 at 381 (1974).

27. A Cox, *The Role of the Supreme Court in American Government.* (New York: Oxford University Press, 1976), p. 113.

28. Senate Hearing pt. 4 at 524.

29. *Planned Parenthood of Missouri v. Danforth,* 74 S. Ct. 1151 (1976).

30. F. Canavan, "The Theory of the Danforth Case," *The Human Life Review,* Fall 1976, p. 9.

31. *Id.,* p. 10.

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33. *Beal v. Doe,* No. 75-554 (Oct. Term 1975); *Maher v. Roe,* No. 75-1440 (Oct. Term 1975); *Poelker v. Doe,* No. 75-442 (Oct. Term 1975).

34. *Public Law* 94-439, Sec. 209.

35. *McRae v. Mathews,* Memorandum and Order Granting Preliminary Injunction (E.D. N.Y. Oct. 22, 1976); *Doe v. Mathews,* Opinion and Order Dismissing Complaint for Lack of Jurisdiction (D. D.C. Oct. 21, 1976); *Doe v. Mathews,* Opinion and Order Denying Temporary Restraining Order (D. N.J. Oct. 1, 1976).

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38. *Buckley v. McRae,* Intervenor-Appellants' Jurisdictional Statement in U.S. Supreme Court at 19.
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# An American Standard

*Senator Jake Garn*

It is a widely held belief that to achieve equality between the sexes a woman ought to be able to use her body in any manner she sees fit. It is argued that a woman should be free either to carry the fetus to birth or to abort the unborn child, and that such a decision should be completely personal.

This argument has a certain appeal because we are all interested in maintaining personal privacy and integrity, with decisions uncoerced by government. But, the fetus is not just another part of a woman's body. The fertilized ovum which develops into a separate living human being cannot be considered a mere appendage to the woman's body. As columnist George Will recently said, the abortion issue is "being trivialized by cant about 'a woman's right to control her body.' Dr. [Leon R.] Kass [a University of Chicago biologist] notes that 'the fetus simply is not a mere part of a woman's body. One need only consider whether a woman can ethically take thalidomide while pregnant to see that this is so.' Dr. Kass is especially impatient with the argument that a fetus with a heartbeat and brain activity 'is indistinguishable from a tumor in the uterus, a wart on the nose, or a hamburger in the stomach.' But that argument is necessary to justify discretionary killing of fetuses on the current scale, and some of the experiments that some scientists want to perform on live fetuses.

". . . Abortion advocates become interestingly indignant when opponents display photographs of the well-formed feet and hands of a nine-week-old fetus. People avoid correct words and object to accurate photographs because they are uneasy about saying and seeing what abortion is. It is *not* the 'termination' of a hamburger in the stomach."

Abortion-on-demand must not be equated with the advancement of the women's movement. On the contrary, abortion is an exploitation of the very dignity of womanhood. Permissive abortion

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**Jake Garn** is the Senior United States Senator from Utah. This article is adapted from his address to the Senate on his introduction of two "life-protecting" constitutional amendments (January 24, 1977). The full texts of the amendments, and the co-sponsors of each, appear in Appendix B of this issue.

makes possible the ultimate degradation of women. Fortunately, growing numbers of women are coming to this realization and groups of "feminists for life" are springing up around the country as women strive for equal rights and the protection of innocent life.

Another issue that has been raised regarding a Human Life Amendment is the effect such an amendment would have on the poor. Again, this is a legitimate concern and one which must not be ignored. This country is dedicated to providing equal justice under law and equal opportunities for the poor. These are noble goals.

It is often alleged that if a Human Life Amendment is passed the rich would continue to have their abortions while the poor would be prevented from doing so. Even if this were true, it is irrelevant. This country cannot predicate its laws upon the practices of the wealthy, particularly when such practices deprive humans of their lives. "Equal justice under law" does not mean that legislatures and courts must legitimize the foibles, attitudes, and evils of the rich. The rich can obtain "quicky" divorces in foreign countries; they can fly to Las Vegas and gamble; they can obtain the best drugs; they can commit innumerable follies because of their wealth. There is no requirement to legalize such folly and, indeed, legislatures and courts have a responsibility to protect society from such errors. This point is made even more powerful by the fact that in the area of abortion we are dealing with human life.

I wish we would no longer hear that the standard of the decadent wealthy ought to be the standard for all, but I am afraid the argument will continue. In fact, it is now being argued that the federal government has a responsibility to pay for such decadence.

Here I would also like to address, briefly, the charge that a Human Life Amendment will have the effect of enacting religious dogma into law. I reject such a claim. The Supreme Court has said that for a statute to "pass muster under the [First Amendment] Establishment Clause" the law in question must first reflect a clearly secular legislative purpose; second, have a primary effect that neither advances nor inhibits religion; and third, avoid excessive government entanglement with religion. I think this is also a fair test for a constitutional amendment, and I believe there is no conflict between this test and a Human Life Amendment.

Can any of us think of a legislative purpose more legitimate — and certainly secular — than the protection of innocent human life? If such a purpose is impermissibly shot through with religious dogma, then what will become of our criminal laws? Will it soon

be alleged that homicide statutes are so rooted in religious tradition and teaching that they are constitutionally impermissible? Such an assertion would be nonsense — and the analogy to the abortion situation should be unmistakable.

It is difficult to see how a Human Life Amendment would have a primary effect that either advances or inhibits religion. We are aware of the long lists of religious groups that favor permissive abortion because such lists have frequently been read on the floor of the Senate. If I were to follow the simplistic arguments of some who invoke the First Amendment Establishment and Free Exercise Clauses to oppose a Human Life Amendment, I could argue that the Supreme Court's decision was constitutionally impermissible because of the large number of religious groups which favor it. Such an argument ignores secular reality and the constitutional truth that a law which has a valid secular purpose will not be struck down because it coincidentally embraces a religious view. Have we now reached the point at which we shy from legislation based on moral principle? Will morality be rejected as a basis for American law? I hope not, for it must not. American law cannot be devoid of conscience.

* * * * *

Also, the important link between the medical facts and their necessary moral and legal implications has been excellently expressed by Dr. Andre Hellegers, Director of the Kennedy Institute for the Study of Human Reproduction and Bioethics. Dr. Hellegers said:

> ". . . That the fetus is alive and not dead is undoubted. If it were dead, abortions would not need to be performed and there would be no child to raise. That the fetus is biologically human is also clear. It simply puts it into a category of life that is different than the cat, the rat or the elephant. So the human fetus represents undoubted human life and genetically it is different than any other animal life.
>
> "But I think what those who do not oppose abortion mean to actually convey is that this life is not sufficiently valuable to be protected. It has no value, no dignity, no soul, no personhood, no claim to be protected under the Constitution. That is not a biological question. That is a value issue. The issue is hidden under such language as 'meaningful' life or 'potential' for life, or 'quality' of life. What is at stake goes far beyond the issue of abortion. The question is this: are there to be live (not dead) humans (not rats, cats, etc.) who are to be considered devoid of 'value,' 'dignity,' 'soul,' 'meaningfulness,' 'protection under the Constitution' or whatever phrase or word by which one wants to describe the inclusionary or exclusionary process?

"This is fundamentally why I am opposed to abortion. It is because it attaches no value to live biological human entities . . ."

As the evidence continues to grow, I am gratified to see people of good faith change their attitudes toward abortion. One of the most notable of these is Dr. Bernard Nathanson, M.D., who once headed the Center for Reproductive and Sexual Health. *Good Housekeeping* called the Center "the busiest licensed abortion facility in the western world [where] from eight in the morning until midnight, seven days a week, doctors working in ten operating rooms performed vacuum aspirations on an endless parade of pregnant wombs. In peak months, more than 3,000 patients paying $150 apiece passed through. . . ."

After a long day at work, Dr. Nathanson faced himself in the mirror and remembers,

"I said to myself: 'All that propaganda you've been spewing out about abortion not involving the taking of human life is nonsense. If that thing in the uterus is *nothing*, why are we spending all this time and money on it?

I became convinced that as director of the clinic I had in fact presided over 60,000 deaths."

He elaborates: "As early as six weeks we can detect heart function in embryos, with an electrocardiograph. We can record brain activity at eight weeks. Our capacity to measure signs of life is becoming more sophisticated every day, and as time goes by we will undoubtedly be able to isolate these signs at earlier and earlier stages in fetal development. To vehemently deny that life begins when conception begins is absurd!

"The product of conception is a human being in a special time of its development, part of a continuum that begins in the uterus, passes through childhood, adolescence and adulthood, and ends in death. The fact that a fetus depends on the placenta for life and can't survive independently doesn't nullify its existence as a human being. A diabetic is wholly dependent on insulin, but that doesn't make him less human.

"I had to face that fact that in an abortion, human life of a special order is being taken."

Finally, I quote from an editorial of *California Medicine,* the official journal of the California Medical Association. The editorial points to the relationship between medical knowledge and ethics and renders a precise and concise explanation of an emerging ethic which abandons intrinsic human worth and substitutes a graduated scale of "meaningfulness."

"In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right, and even necessary. It is worth noting that this shift in public attitude has affected churches, the laws and public policy rather than the reverse. Since the old ethic has not yet

> been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forward under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected."

The medical evidence is overwhelming. The "thing" that is aborted is a tiny, helpless, developing human being. All other considerations must be subordinated to this fact. Privacy cannot be more important; convenience cannot be more important; the elimination of poverty cannot be more important; nor can any other concern override what must be our pre-eminent concern — life. Not the "quality of life," but existence itself. Not the "meaningfulness of life," but being itself. Life, existence, being: that essence upon which all rights are dependent must itself be reenshrined as a constitutional right because of the blindness of the Court.

It has been said that the essence of civilization is the "agreement together in concord and amity respecting certain moral values." This common morality is frequently expressed in terms of law, and in law frequently in term of "rights." We accept the premise that there are certain fundamental, inalienable rights which attach to human beings without regard to station or status in life. The just society attempts to define and secure such rights and to do so broadly and evenly.

As with other civil rights issues, what is at stake is the *practical application* of the right. Theory and sermons about rights and justice and equality have their place but we are increasingly coming to the point where we deny in practice what we pronounce in theory. "The principle which has animated our society and which has a ring of absoluteness about it is that innocent human life may never be taken. That is something which is violated in practice, but which has never been violated in theory." Now, however, even the theory is being violated. The growing numbers of aborted babies (which now reach into the millions) and the growing elective-abortion mentality are stabbing that animating principle. A Human Life Amendment is intended to stop the assault on this life-protecting principle and heal its wound.

Regarding the right to life, we may paraphrase a statement by Sir Patrick Devlin, a distinguished English judge: "It has got there be-

cause it is moral — but it remains there because it is built into the house in which we live and could not be removed without bringing it down." The right to life is a great beam which runs through the house of this republic and of all societies justly seen as good and worthy of imitation. I fear for the stability of the structure if that beam is removed. If the beam should be removed and the walls still stand, are those who live therein safe?

Norman St. John-Stevas, M.P., has made the following conclusion which I find precise: "The acceptance of this concept [i.e., the right to life] by the law has made a profound difference to our society. It is the premise not only of liberty, but perhaps even more of equality, and, above all, of fraternity. There have been, we should recall, other legal systems which have consigned the right to life to a class, and have excluded whole sections of society from its application. The great slave empires of the past — the Greek and Roman Empires — were examples of such societies. We have had the recent example of the Third Reich of Hitler, which was based on the limited idea of the right to life." Today, we face the tragic reality that many countries, whether great or insignificant, are engaged in conscientious efforts to deprive their citizens of basic human rights, including the right to life.

It is the challenge of America to set the world's standard for human rights — a standard at once historical and timely, noble and egalitarian; a standard to which good men and women everywhere may rally; a standard based on the inalienable rights of life, liberty, and the pursuit of happiness — a human life and a human rights standard, a standard now requiring the ratification of a Human Life Amendment and a standard to which we invite all to adhere.

# The Convention Method of Amending the Constitution

*Sam J. Ervin, Jr.*

ARTICLE V of the Constitution of the United States[1] provides that constitutional amendments may be proposed in either of two ways — by two-thirds of both houses of the Congress or by a convention called by the Congress in response to the applications of two-thirds of the state legislatures. Although the framers of the Constitution evidently contemplated that the two methods of initiating amendments would operate as parallel procedures, neither superior to the other, this has not been the case historically. Each of the twenty-five constitutional amendments ratified to date was proposed by the Congress under the first alternative. As a result, although the mechanics and limitations of congressional power under the first alternative are generally understood, very little exists in the way of precedent or learning relating to the unused alternative method in article V. This became distressingly clear recently, following the disclosure that thirty-two state legislatures had, in one form or another, petitioned the Congress to call a convention to propose a constitutional amendment permitting states to apportion their legislatures on the basis of some standard other than the Supreme Court's "one man-one vote" requirement. The scant information and considerable misinformation and even outright ignorance displayed on the subject of constitutional amendment, both within the Congress and outside of it — and particularly the dangerous precedents threatened by acceptance of some of the constitutional misconceptions put forth — prompted me to introduce in the Senate a legislative proposal designed to implement the convention amendment provision in article V. This article will discuss that provision of the Constitution, the major questions involved in its implementation, and the answers to those questions supplied by the provisions of the bill, Senate Bill No. 2307.[2]

## *II. Background*

On March 26, 1962, the United States Supreme Court, in the landmark case of *Baker v. Carr*,[3] held that state legislative appor-

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tionment is subject to judicial review in federal courts, thus overruling a long line of earlier decisions to the contrary. Two years later, on June 15, 1964, in *Reynolds v. Sims*,[4] the controversial "one man-one vote" decision, the Court held that the equal protection clause of the Fourteenth Amendment requires that both houses of bicameral state legislatures be apportioned on a population basis.

The two decisions evoked a storm of controversy. In the Congress, dissatisfaction with the Court's intrusion into the hitherto nonjusticiable political thicket resulted in attempts in both houses to reverse the rulings by legislation or constitutional amendment. On August 19, 1964, the House of Representatives passed a bill introduced by Representative Tuck of Virginia which would have stripped federal district courts of jurisdiction over state apportionment cases and denied the Supreme Court appellate jurisdiction over such cases. The Senate declined to invoke that extreme remedy, passing instead a "sense of Congress" resolution that the state legislatures should be given time to reapportion before the federal judiciary intervened further. In both 1965 and 1966, however, a majority of the Senate voted to propose the so-called "Dirksen amendment" to the Constitution, which would permit a state to apportion one house of its bicameral legislature on some standard other than population. But the amendment failed both times to get the required two-thirds vote, failing fifty-seven to thirty-nine in 1965 and fifty-five to thirty-eight in 1966.

A more extraordinary effect of the rulings in *Baker v. Carr* and *Reynolds v. Sims* was the activity generated in the state legislatures designed to reverse the Court's rulings by means of a constitutional amendment proposed by a convention convened under the second clause of article V. In December 1962, following *Baker v. Carr,* the Council of State Governments, at its Sixteenth Biennial General Assembly of the States, recommended that the state legislatures petition the Congress for a constitutional convention to propose three amendments, including an amendment to accomplish essentially the same purpose as the Tuck bill, that is, the denial to federal courts of original and appellate jurisdiction over state legislative apportionment cases. In response to this call, twelve state petitions were sent to the Congress during 1963 requesting a constitutional convention to propose such an amendment.[5] Although this was the largest number of petitions on the same subject ever received by the Congress in any one year, the total was far below the required thirty-four, and their receipt caused no excitement in the Congress and attracted no public attention.

In December 1964, following the decision in *Reynolds v. Sims,* the Seventeenth Biennial General Assembly of the States recommended that the state legislatures petition the Congress to convene a constitutional convention to propose an amendment along the lines of the Dirksen amendment, permitting the states to apportion one house of a bicameral legislature on some standard other than population. The response to this call was even greater than in 1963. Twenty-two states submitted constitutional convention petitions to Congress during the Eighty-ninth Congress (1965 and 1966) and four more during the first session of the Ninetieth Congress (1967). If one counted the petitions adopted by four other states, questionable in regard to their proper receipt by Congress,[6] this brought the total number of state petitions on the subject of state legislative apportionment to thirty-two.

At this point, March 1967, the situation attracted the first attention in the press. A *New York Times* story on March 18, 1967,[7] reported that only two more petitions were necessary to invoke the convention amendment procedure. The immediate reaction was a rash of newspaper editorials and articles, almost uniformly critical of the effort to obtain a convention, and a flurry of speeches on the subject in the Congress. Whether favorable or unfavorable to the efforts by the states, all of these press items and all of the congressional speeches had one common denominator. They all bore the obvious imprint of the authors' feelings about the merits of state legislative apportionment. Those newspapers that had editorially supported the Supreme Court's decisions now decried the states' "back-door assault on the Constitution."[8] Those newspapers that had criticized "one man-one vote" now applauded the effort by the state legislators to overrule the new principle by constitutional amendment. Much more disturbing to me was the fact that many of my colleagues in the Senate seemed to be influenced more by their views on the reapportionment issue than by concern for the need to answer objectively some of the perplexing constitutional questions raised by the states' action. Those Senators who had been critical of the "one man-one vote" decision and were eager to undo it now expressed the conviction that the Congress was obligated to call a convention when thirty-four petitions were on hand and that it had little power to judge the validity of state petitions. Those Senators who agreed with the Supreme Court's ruling were now contending that some or all of the petitions were invalid for a variety of reasons and should be discounted, and that, in any case, Congress did not have to call a convention if it did not wish to. Most distress-

ing of all was the apparent readiness of everyone to concede that any convention, once convened, would be unlimited in the scope of its authority and empowered to run rampant over the Constitution, proposing any amendment or amendments that happened to strike its fancy. That interpretation, supported neither by logic nor constitutional history, served the convenience of both sides in the apportionment controversy. Those who did not want to call a convention that might propose a reapportionment amendment pointed out that an open convention would surely be a constitutional nightmare. Opponents of "one man-one vote" cited the horrors of an open convention as an additional reason for proposal of a reapportionment amendment by the Congress.

My conviction was that the constitutional questions involved were far more important than the reapportionment issue that had brought them to light, and that they should receive more orderly and objective consideration than they had so far been accorded. Certainly it would be grossly unfortunate if the partisanship over state legislative apportionment — and I am admittedly a partisan on that issue — should be allowed to distort an attempt at clarification of the amendment process, which in the long run must command a higher obligation and duty than any single issue that might be the subject of that process. Any congressional action on this subject would be a precedent for the future, and the unseemly squabble that had already erupted was to me a certain indication that only bad precedents could result from an effort to settle questions of procedure under article V simultaneously with the presentation of a substantive issue by two-thirds of the states. Although it is not easy to anticipate all of the problems that may develop in the convention amendment process, nor to deal with those problems wisely in the abstract, I nevertheless felt that the wisest course would be to consider and enact permanent legislation to implement the convention amendment provision in article V.

I introduced S. 2307 on August 17, 1967. In my statement accompanying introduction, I stressed that I was not committed to the provisions of the bill as then drafted. I was convinced only of the necessity for action on the subject, action that might forestall a congressional choice between chaos on the one hand and refusal to abide the commands of article V on the other. Open hearings on the bill were held on October 30 and 31, 1967, before the Senate Subcommitte on Separation of Powers. The testimony revealed deficiencies in the bill and suggested modifications and additions. As a result, I have subsequently amended the bill in several respects.

In discussing specific questions raised by the bill, I shall describe the relevant provision of the original draft and note the amendments made since the hearings.

## *III. Questions Raised by the Bill*

Before going to specific issues and matters of detail, it seems appropriate to discuss briefly two threshold problems posed by the bill: whether the Congress has the power to enact such legislation, and, if it does, what policy considerations should guide it in exercising such power.

I have no doubt that the Congress has the power to legislate about the process of amendment by convention. The Congress is made the agency for calling the convention, and it is hard to see why the Congress should have been involved in this alternative method of proposal at all unless it was expected to determine such questions as when sufficient appropriate applications had been received and to provide for the membership and procedures of the convention and for review and ratification of its proposals. Obviously the fifty state legislatures cannot themselves legislate on this subject. The constitutional convention cannot do so for it must first be brought into being. All that is left, therefore, is the Congress, which, in respect to this and other issues not specifically settled by the Constitution, has the residual power to legislate on matters that require uniform settlement. Add to this the weight of such decisions as *Coleman v. Miller*,[9] to the effect that questions arising in the amending process are nonjusticiable political questions exclusively in the congressional domain, and the conclusion seems inescapable that the Congress has plenary power to legislate on the subject by amendment by convention and to settle every point not actually settled by article V of the Constitution itself.

With respect to the second problem, within what general policy limitations that power should be exercised, I think the Congress should be extremely careful to close as few doors as possible. Any legislation on this subject will be what might be called "quasi-organic" legislation; in England it would be recognized as a constitutional statute. When dealing with such a measure, it is wise to bear in mind Marshall's well-worn aphorism that it is a Constitution we are expounding and not get involved in "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must [be] seen dimly, and which can best be provided for as they occur."[10] This approach is reflected at several points in the bill, notably in its failure to try to anticipate and enumerate the various

grounds on which Congress might justifiably rule a state petition invalid, and its failure to prescribe rigid rules of procedure for the convention. In addition, I think the Congress, in exercising its power under article V, should bear in mind that the Framers meant the convention method of amendment to be an attainable means of constitutional change. This legislation can be drawn so as to place as many hurdles as possible in the way of effective use of the process; or it can be drawn in a manner that will make such a process a possible, however improbable, method of amendment. The first alternative would be a flagrant disavowal of the clear language and intended function of article V. I have assumed that the Congress will wish to take the second road, and the bill is drawn with that principle in mind.

**Open or Limited Convention?**

Perhaps the most important issue raised by the bill is the question of the power of the Congress to limit the scope and authority of a convention convened under article V in accordance with the desires of the states as set forth in their applications. This was, as I have noted, one of the issues that most troubled me when I first heard of the efforts by the states to call a convention.

It has been argued that the subject matter of a convention convened under article V cannot be limited, since a constitutional convention is a premier assembly of the people, exercising all the power that the people themselves possess, and therefore supreme to all other governmental branches or agencies. Certainly, according to this argument, the states may not themselves, in their applications, dictate limitations on the convention's deliberations. They may not require the Congress to submit to the convention a given text of an amendment, nor even a single subject or idea. For the convention must be free to "propose" amendments, which suggests the freedom to canvass matters afresh and to weigh all possibilities and alternatives rather than ratify a single text or idea. The states may in their applications specify the amendment or amendments they would hope the convention would propose. But once the Congress calls the convention, those specifications would not control its deliberations. The convention could not be restricted to the consideration of certain topics and forbidden to consider certain other topics, nor could it be forbidden to write a new constitution if it should choose to do so.

I will concede that such an interpretation can be wrenched from article V — but only through a mechanical and literal reading of the words of the article, totally removed from the context of their

promulgation and history. My reading of the debates on article V at the Philadelphia Convention and the other historical materials bearing on the intended function of the amendment process[11] leads me to the opposite conclusion. As I understand the debates, the Founders were concerned, first, that they not place the new government in the same straitjacket that inhibited the Confederation, unable to change fundamental law without the consent of every state. The amendment process, rather a novelty for the time, was therefore included in the Constitution itself. Second, the final form of article V was dictated by a major compromise between those delegates who would utilize the state legislatures as the sole means of initiating amendments and those who would lodge that power exclusively in the national legislature. The forces at the convention that sought to limit the power of originating amendments to the states were at first dominant. The original Virginia Plan, first approved by the convention, excluded the national legislature from participation in the amendment process. On reconsideration, the forces that would limit the power of origination of amendments to the national legislature became prevalent. The arguments on both sides were persuasive: the improprieties or excess of power in the national government would not likely be corrected except by state initiative, while improprieties by the state governments or deficiencies in national power would not likely be corrected except by national initiative. In the spirit that typified the 1787 Convention, the result was acceptance of a Madison compromise proposal which read, as the final article was to read, in terms of alternative methods.

It is clear that neither of the two methods of amendment was expected by the Framers to be superior to the other or easier of accomplishment. There is certainly no indication that the national legislature was intended to promote individual amendments while the state legislatures were to be concerned with more extensive revisions. On the contrary, there is strong evidence that what the members of the convention were concerned with in both cases was the power to make specific amendments. They did not appear to anticipate a need for a general revision of the Constitution. And certainly this was understandable, in light of the difficulties that they had in finding the compromises to satisfy the divergent interests needed for ratification of their efforts. Provision in article V for two exceptions to the amendment power[12] underlines the notion that the convention anticipated specific amendment or amendments rather than general revision. For it is doubtful that these exceptions could have been expected to control a later general revision.

This construction is supported by references to the amendment process in the *Federalist Papers*. In *Federalist No. 43*, James Madison explained the need and function of article V as follows:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as as they may be pointed out by the experience on one side or on the other.

Hamilton, in *Federalist No. 85*, was even more emphatic in pointing out the possibility of specific as well as general amendment of the Constitution on the initiative of the state legislatures:

> But every amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place.

Apart from being inconsistent with the language and history of article V, the contention that any constitutional convention must be a wide open one is neither a practicable nor a desirable one. If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the states to call for a convention in the absence of a general discontent with the existing constitutional system. This construction would effectively destroy the power of the states to originate the amendment of errors pointed out by experience, as Madison expected them to do. Alternatively, under that construction, applications for a limited convention deriving in some states from a dissatisfaction with the school desegregation cases, in others because of the school prayer cases, and in still others by reason of objection to the *Miranda* rule, could all be combined to make up the requisite two-thirds of the states needed to meet the requirements of article V. I find it hard to believe that this is the type of consensus that was thought to be appropriate to calling for a convention. For if such disparate demands were sufficient, all the applications to date — and there are a large number of them — should be added up to see whether, in what is considered an appropriate span of time, two-thirds of the states have made demands for a constitutional convention to propose amendments, no matter the

cause for applications or the specifications contained in them. Moreover, once such a convention were convened, it could refuse to consider any of the problems or subjects specified in the states' applications, and instead propose amendments on other subjects or rewrite the Constitution in a manner unacceptable to any of the applicant states.

My construction of article V, with reference to the initiation of the amendment procedure by the state legislatures, is consistent with the literal language of the article as well as its history, and is more desirable and practicable than the alternative construction. As I see it, the intention of article V was to place the power of initiation of amendments in the state legislatures. The function of the convention was to provide a mechanism for effectuating this initiative. The role of the states in filing their applications would be to identify the problem or problems that they believed to call for resolution by way of amendment. The role of the convention that would be called by reason of such action by the states would then be to decide whether the problem called for correction by constitutional amendment and, if so, to frame the amendment itself and propose it for ratification as provided in article V. The bill carries out this intention in keeping not only with the letter but also with the spirit of article V.

The bill provides that state petitions to the Congress which request the calling of a convention under article V shall state the nature of the amendment or amendments to be proposed by such convention. Upon receipt of valid applications from two-thirds or more of the states requesting a convention on the same subject or subjects, the Congress is required to call a convention by concurrent resolution, specifying in the resolution the nature of the amendment or amendments for the consideration of which the convention is being called. The convention may not propose amendments on other subjects and, if it does, the Congress may refuse to submit them to the states for ratification.

Under the provisions, the states could not require the Congress to submit to a convention a given text of an amendment, demanding an up or down vote on it alone. But they could require the Congress to submit a single subject or problem, demanding action on it alone. They could not, however, define the subject so narrowly as a deprive the convention of all deliberative freedom. To use the reapportionment issue as an example, the states could not require the Congress to call a convention to accept or reject the exact text of the reapportionment amendment recommended by the Coun-

cil of State Governments, for then the convention would be merely a ratifying body. But they could properly petition for a convention to consider the propriety of proposing a constitutional amendment to deal with the reapportionment problems raised by the Supreme Court decision, defining those problems in specific terms. The convention would then be confined to that subject, but it would be free to consider the propriety of proposing any amendment and the form the amendment should take — that of the Dirksen proposal, the Tuck proposal, or some other form. To take another example, those states which might desire a convention to deal with the *Escobedo-Miranda* issue could phrase their petitions generally in terms of the problem of federal control over the criminal processes of the states. The convention would then be confined to that subject, but would nevertheless have great deliberative freedom to canvass all possible solutions and propose whatever amendment or amendments it deemed appropriate to respond to the problems identified by the states.

I am convinced that these provisions of the bill fully accord with the mandate of article V, its history, and intended function.

**May Congress Refuse to Call a Convention?**

Perhaps the next most important question raised by the bill is whether the Congress has any discretion to refuse to call a convention in the face of appropriate applications from a sufficient number of states.

Article V states that Congress "shall" call a convention upon the applications of the legislatures of two-thirds of the states. I have absolutely no doubt that the article is peremptory and that the duty is mandatory, leaving no discretion to the Congress to review the wisdom of the state applications. Certainly this is the more desirable construction, consonant with the intended arrangement of article V as described in the preceding section of this article. The founders included the convention alternative in the amending article to enable the states to initiate constitutional reform in the event the national legislature refused to do so. To concede to the Congress any discretion to consider the wisdom and necessity of a particular convention call would in effect destroy the role of the states.

The comments of both Madison and Hamilton, subsequent to the 1787 Convention, sustain this construction. In a letter on the subject, Madison observed that the question concerning the calling of a convention "will not belong to the Federal Legislature. If two-thirds of the states apply for one, Congress cannot refuse to call it:

if not, the other mode of amendments must be pursued."[13] Hamilton, in the *Federalist No. 85,* stated:

> By the fifth article of the plan the congress will be *obliged,* "on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion.

It has been argued forcefully that, notwithstanding the language of article V, the Congress need not call a convention if it does not wish to do so, and that, in any event no legislation such as this can commit a future Congress to call a convention against its judgment. This argument is based on the premise that although article V provides that Congress "shall" call a convention if enough states apply, this word may be interpreted to mean "may" for all practical purposes, since the courts are not apt to try to enforce the obligation if Congress wishes to evade it. I cannot accept such a flagrant disregard of clear language and purpose.

Although it may be true that no legislation by one Congress can bind a subsequent Congress to vote for a convention, and that the courts will not intervene, it is my strong feeling that the bill should recognize the fact that the Congress has a strict constitutional duty to call a convention if a sufficient number of proper applications are received. The bill does this by providing that it shall be the duty of both houses to agree to a concurrent resolution calling a convention whenever it shall be determined that two-thirds of the state legislatures have properly petitioned for a convention to propose an amendment or amendments on the same subject. Concededly, the Congress cannot be forced by the courts or by the provisions of this bill to vote for a particular convention. However, every member has taken an oath to support the Constitution, and I cannot believe a majority of the Congress will choose to ignore its clear obligation, I would hope, moreover, that this bill will facilitate the path to congressional action by underlining the obligation of the Congress to act.

**Sufficiency of State Applications**

Assuming the Congress may not weigh the wisdom and necessity of state applications requesting the calling of a constitutional convention, does it have the power to judge the validity of state applica-

tions and state legislative procedures adopting such applications? Clearly the Congress has some such power. The fact alone that Congress is made the agency for convening the convention upon the receipt of the requisite number of state applications suggests that it must exercise some power to judge the validity of those applications. The impotence or withdrawal of the courts underlines the necessity for lodging some such power in the Congress. The relevant question, then, concerns the extent of that power.

It has been contended that Congress must have broad powers to judge the validity of state applications and that such power must include the authority to look beyond the content of an application, and its formal compliance with article V, to the legislative procedures followed in adopting the application. The counterargument is that to grant Congress the power to reject applications, particularly if that power is not carefully circumscribed, would be to supply it with a means of avoiding altogether the obligation to call a convention. The result would be that the Congress could arbitrarily reject all applications on subjects it did not consider appropriate for amendment, leaving us in effect with only one amendment process.

In drafting the bill I was mainly concerned with limiting the power of the Congress to frustrate the initiative of the states, particularly since the debate on the Senate floor at the time indicated that some Senators were inclined to seize on any slight irregularity in a petition as a basis for not counting it. My bill, as introduced, therefore set forth only requirements as to the content of state applications, leaving questions of legislative procedure for determination solely by the individual states, with their decisions made binding on the Congress and the courts. However, I think the hearing amply demonstrated the danger of disabling the Congress from reviewing the procedural validity of state petitions. In general, state legislatures ought to be masters of their own procedures. But this is a federal function that they would be performing, and the Congress should retain some power uniformly to settle the questions of irregularity that might arise. The bill has therefore been amended to remove the disability of the Congress to review legislative procedures. Under the amended bill, Congress would retain broad powers in this respect, indeterminate and unforeseeable in nature, but to be exercised, I would hope, rarely and with restraint.

It might be well to say something at this point on a question that is much debated: whether a legislature that has been held to be malapportioned, or that is under a decree requiring it to reap-

portion and perhaps qualifying its powers in some measure before reapportionment, can validly pass a resolution for a constitutional convention. I should think in general that it could, unless an outstanding decree forbids it to do so, either specifically or by mention of some analogous forbidden function. To open to congressional review the question of the propriety of state legislative composition would be to open a Pandora's box of constitutional doubts about the validity even of the Fourteenth Amendment.

However, the bill does not expressly answer this question. This is one of the many questions of irregularity on which the Congress will have to work its will should the question be squarely presented in the form of thirty-four state applications including some passed by malapportioned legislatures.

One further important point should be mentioned. Most of the states obviously do not now understand their role in designating subjects or problems for resolution by amendment, and many of them do not even know where to send their applications. By setting forth the formal requirements with respect to content of state applications and designating the congressional officers to whom they must be transmitted, the bill furnishes guidance to the states on these questions and promises to avert in the future some of the problems that have arisen in the current effort to convene a convention. The bill also requires that all applications received by the Congress be printed in the *Congressional Record* and that copies be sent to all members of Congress and to the legislature of each of the other states. In this way, the element of congressional surprise can be eliminated, and each state can be given prompt and full opportunity to join in any call for a convention in which it concurs.

### The Role of State Governors

The argument has been made that a state application for a constitutional convention must be approved by both the legislature and the governor of the state to be effective. This argument rests on the claim that article V intended state participation in the process to involve the whole legislative process of the state as defined in the state constitution. I do not agree with that argument. We do not have here any question about the exercise of the lawmaking process by a state legislature in combination with whatever executive participation might be called for by state law. We have rather a question of heeding the voice of the people of a state in expressing the possible need for a change in the fundamental document. It seems clear to me that the Founders properly viewed the state legislatures

as the sole representative of the people on such a matter, since the executive veto, a carryover from the requirement of royal assent, was not regarded as the expression of popular opinion at the time of the 1787 Convention. And, to resort to the kind of literalism invoked by others as appropriate for construction of other provisions of article V, the language of the article definitely asserts that the appropriate applications are to come from "legislatures."

Closely analogous court decisions support this interpretation. The Supreme Court in *Hawke v. Smith, No. 1*[14] interpreted the term "legislatures" in the ratification clause of article V to mean the representative lawmaking bodies of the states, since ratification of a constitutional amendment "is not an act of legislation within the proper sense of the word."[15] Certainly the term "legislature" should have the same meaning in both the application clause and the ratification clause of article V. Further support is found in the decision in *Hollingsworth v. Virginia,*[16] in which the Court held that a constitutional amendment approved for proposal to the states by a two-thirds vote of Congress need not be submitted to the President for his signature or veto.

The bill therefore provides specifically that a state application need not be approved by the state's governor in order to be effective.

**May a State Rescind Its Applications?**

The question of whether a state should be allowed to rescind an application previously forwarded to the Congress is another of the political questions to which the courts have not supplied answers and presumably cannot. The Supreme Court has held that questions concerning the rescission of prior ratifications or rejections of amendments proposed by the Congress are determined solely by Congress.[17] Presumably, then, the question of rescission of an application for a convention is also political and nonjusticiable. Although the Congress has previously taken the position that a state may not rescind its prior ratification of an amendment, it has taken no position concerning rescission of applications. My strong conviction is that rescission should be permitted. Since a two-thirds consensus among the states at some point in time is necessary in order for the Congress to call a convention, the Congress should consider whether there has been a change of mind among some states that have earlier applied. Moreover, an application is not a final action, since it serves merely to initiate a convention, and does not commit even the applicant state to any substantive amendment that might eventually be proposed.

The bill therefore provides that a state may rescind at any time before its application is included among an accumulation of applications from two-thirds of the states, at which time the obligation of the Congress to call a convention becomes fixed. Incidentally, the bill also provides that a state may rescind its prior ratification of an amendment proposed by the convention up until the time there are existing valid ratifications by three-fourths of the states, and that a state may change its mind and ratify a proposed amendment that it previously has rejected.

Another much debated point concerning state applications for a constitutional convention is timing. In order to be effective to mandate the Congress to act, within how long a period must applications be received from two-thirds of the state legislatures? Article V is silent on this question, and neither the Congress nor the courts has supplied an answer.

The Congress and the courts have agreed that constitutional amendments proposed by the Congress and submitted to the states for ratification can properly remain valid for ratification for a period of seven years. It has been felt that there should be a "reasonably contemporaneous" expression by three-fourths of the states that an amendment is acceptable in order for the Congress to conclude that a consensus in favor of the amendment exists among the people, and that ratification within a seven-year period satisfies this requirement.[18] Presumably, the same principle should govern the application stage of the constitutional amendment process. If so, the Congress would not be required, nor empowered, to call a convention unless it received "relatively contemporaneous" valid applications from the necessary number of states. This rule seems sensible. The Constitution contemplates a concurrent desire for a convention on the part of the legislatures of a sufficient number of states, and such a concurrent desire can scarcely be said to exist, or to reflect in each state the will of the people, if too long a period of time has passed from the date of enactment of the first application to the date of enactment of the last. It is true that legislatures are free under the bill to change their minds and rescind their applications; but the passage of a repealer is a different and more difficult political act than the defeat, starting fresh, of an application calling for a constitutional convention. The fact, therefore, that a legislature has not rescinded an application calling for a convention is an insufficient indication that the state in question, after the passage of a long period of time, still favors the calling of a convention.

What, then, is a proper period during which tendered applications are sufficiently contemporaneous to be counted together? Some Senators and scholars have suggested that two years, the lifetime of a Congress, would be a reasonable period. Others have suggested that petitions should remain valid for a generation. My feeling when I drafted the bill was that six years would be a reasonable compromise. However, the hearings revealed a general disposition among the witnesses to agree on a four-year period. Since this would be long enough to afford ample opportunity to all the state legislatures to join in the call for a convention — particularly in view of the requirement in the bill that all other states be given immediate notice of any application received by the Congress — I have concluded that a four-year period is preferable.

The bill has therefore been amended to provide that an application shall remain valid for four years after receipt by the Congress unless sooner rescinded. The bill also provides that rescission must be accomplished by means of the same legislative procedures followed in adopting the application in question, and that the Congress retains power to judge the validity of those proceedings.

**Calling the Convention**

The bill provides that the Secretary of the Senate and the Clerk of the House of Representatives shall keep a record of the number of state applications received, according to subject matter. Whenever two-thirds of the states have submitted applications on the same subject or subjects, the presiding officer of each house shall be notified and shall announce the same on the floor. Each house is left free to adopt its own rules for determining the validity of the applicants, presumably by reference to a committee followed by floor action. Once a determination has been made that there are valid applications from two-thirds or more of the state legislatures on the same subject or subjects, each house must agree to a concurrent resolution providing for the convening of a constitutional convention on such subject or subjects. The concurrent resolution would designate the place and time of meeting of the convention, set forth the nature of the amendment or amendments the convention is empowered to consider and propose, and provide for such other things as the provision of funds to pay the expenses of the convention and to compensate the delegates. The convention would be required to be convened not later than one year after adoption of the resolution.

As introduced, the bill required the Congress to designate in the concurrent resolution convening a convention the manner in which

any amendments proposed by the convention must be ratified by the states and the period within which they must be ratified or deemed inoperative. Testimony at the hearings suggested that these determinations might properly be influenced by the nature of the amendments proposed and that they should therefore not be required to be made at the time the convention is called. For example, certain proposed amendments might call for ratification by state conventions rather than state legislatures, and certain circumstances might indicate a shorter or longer period than usual during which ratification should take place. The Congress should be able to make those decisions after it has the convention's proposals. The bill therefore has been amended to so provide.

The bill as introduced provided that each state should have as many delegates as it is entitled to representatives in Congress, to be elected or appointed as provided by state law. However, the hearings revealed a general feeling that the national interest is too closely affected to permit each state to decide how its delegates to a national constitutional convention shall be elected, or, indeed, appointed. For this reason, the bill has been amended to require that delegates be elected — not appointed — and that they be elected by the same constituency that elects the states' representatives in Congress. Under the amended bill, each state will be entitled to as many delegates as it is entitled to Senators and Representatives in Congress. Two delegates in each state will be elected at large and one delegate will be elected from each congressional district in the manner provided by state law. Vacancies in a state's delegation will be filled by appointment of the governor.

**Convention Procedure and Voting**

The bill provides that the Vice President of the United States shall convene the constitutional convention, administer the oath of office of the delegates and preside until a presiding officer is elected. The presiding officer will then preside over the election of other officers and thereafter. Further proceedings of the convention will be in accordance with rules adopted by the convention. A daily record of all convention proceedings, including the votes of delegates, shall be kept, and shall be transmitted to the Archivist of the United States within thirty days after the convention terminates. The convention must terminate its proceedings within one year of its opening unless the period is extended by the Congress by concurrent resolution.

As introduced, the bill provided that each state should have one

vote on all matters before the convention, including the proposal of amendments. This was decided upon in deference to the method followed in the 1787 Convention rather than from a conviction that this would be the necessarily proper procedure in conventions called under article V. On the basis of the testimony presented at the hearings, I have decided that unit voting would not be appropriate for such conventions. The reasons for unit voting in the 1787 Convention were peculiar to the background against which that convention worked and are not valid today. Moreover, the states, as units, will have equal say in the ratification process. It seems appropriate, therefore, to recognize the interests of majority rule in the method of proposing amendments. Hence, the bill has been amended to provide that each state delegate shall have one vote so that the voting strength of each state will be in proportion to its population.

Finally, the bill provides that amendments may be proposed by the convention by a vote of a majority of the total number of delegates to the convention. The alternative would be to impose a two-thirds voting requirement analogous to the requirement for congressional proposal of amendments. However, article V does not call for this, and I think that such a requirement would place an undue and unnecessary obstacle in the way of effective utilization of the convention amendment process.

**Ratification of Proposed Amendments**

The bill provides that any amendment proposed by the convention must be transmitted to the Congress within the thirty days after the convention terminates its proceedings. The Congress must then transmit the proposed amendment to the Administrator of General Services for submission to the states. However, the Congress may, by concurrent resolution, refuse to approve an amendment for submission to the states for ratification, on the grounds of procedural irregularities in the convention or failure of the amendment to conform to the limitations on subject matter imposed by the Congress in the concurrent resolution calling the convention. The intent is to provide a means of remedying a refusal by the convention to abide by the limitations on its authority to amend the Constitution. Of course, unlimited power in the Congress to refuse to submit proposed amendments for ratification would destroy the independence of the second alternative amending process. Therefore, the Congress is explicitly forbidden to refuse to submit a proposed amendment for ratification because of doubts about the merits of its substantive provisions. The power is reserved for use only with respect to amend-

ments outside the scope of the convention's authority or in the case of serious procedural irregularities.

Ratification by the states must be by state legislative action or convention, as the Congress may direct, and within the time period specified by the Congress. The Congress retains the power to review the validity of ratification procedures. As noted earlier, any state may rescind its prior ratification of an amendment by the same processes by which it ratified it, except that no state may rescind after that amendment has been validly ratified by three-fourths of the states. When three-fourths of the states have ratified a proposed amendment, the Administrator of General Services shall issue a proclamation that the amendment is a part of the Constitution, effective from the date of the last necessary ratification.

## *IV. Conclusion*

There is some evidence that the current effort to require the Congress to call a convention to propose a reapportionment amendment has failed and that the danger of a constitutional crisis has passed. The two additional applications needed to bring the total to thirty-four have not been received and there is a strong likelihood that some applicant states will rescind their applications. Even if this is the case, however, the need for legislation to implement article V remains. There may well be other attempts to utilize the convention amendment process and, in the absence of legislation, the same unanswered questions will return to plague us. The legislation therefore is still timely, and the Congress may now have the opportunity to deal with the sensitive constitutional issues objectively, uninfluenced by competing views on state apportionment or any other substantive issue.

Some have argued that the convention method of amendment is an anomaly in the law, out of step with modern notions of majority rule and the relationship between the states and the federal government. If so, that part of article V should be stricken from the Constitution by the appropriate amendment process. It should not, however, be undermined by erecting every possible barrier in the way of its effective use. Such a course would be a disavowal of the clear language and history of article V. The Constitution made the amendment process difficult, and properly so. It certainly was not the intention of the original Convention to make it impossible. Nor is it possible to conclude that the Founders intended that amendments originating in the states should have so much harder a time of it than those proposed by Congress. As I have pointed out, that issue

was fought out in 1787 Convention and resolved in favor of two originating sources, both difficult of achievement, but neither impossible and neither more difficult than the other. My bill seeks to preserve the symmetry of article V by implementing the convention alternative so as to make it a practicable but not easy method of constitutional amendment.

## NOTES

1. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. *U.S. Const. Art. V.*

2. The text of the bill, as amended, is set forth as an appendix to this Article. As of this writing, the amended bill has not been approved by the Committee on the Judiciary. The reported bill may include additional amendments.

3. 369 U.S. 186 (1962).

4. 377 U.S. 533 (1964).

5. Copies of the applications referred to herein are on file in the offices of the Committees on the Judiciary of the United States Senate and House of Representatives.

6. New Hampshire, Colorado, Utah, and Georgia have adopted applications, but copies are not on file with the Senate and House Judiciary Committees.

7. The New York *Times*, March 18, 1967 (city ed.), at 1, col. 6.

8. Editorial, The Washington *Post*, March 21, 1967, at A-10, col. 1.

9. 307 U.S. 433 (1939).

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

11. *E.g.*, LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA; ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 135-36 (1964); THE FEDERALIST NOS. 43 & 85 (J. Cooke ed. 1961); L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION (1942); THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1937). The relevant excerpts from these and other sources are printed as an appendix to the *Hearings on the Federal Constitutional Convention Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, United States Senate, Oct. 30 and 31, 1967.

12. *See* the text of Art. V quoted in note 1 *supra.*

13. U.S. BUREAU OF ROLLS AND LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA V, 141, 143, *quoting* Madison's letter to Mr. Eve, dated Jan. 2, 1789.

14. 253 U.S. 221 (1920).

15. *Id.* at 229.

16. 3 U.S. (3 Dall.) 378 (1798).

17. *Coleman v. Miller*, 307 U.S. 433, 448-49 (1939).

18. *Dillon v. Gloss*, 256 U.S. 368 (1921).

## *Bill S. 2307*

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Federal Constitution Convention Amendment Act."

*Applications for Constitutional Convention*

SEC. 2. The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments to the Constitution of the United States and stating the nature of the amendment or amendments to be proposed.

*Application Procedure*

SEC. 3(a) For the purpose of adopting or rescinding a resolution pursuant to section 2, the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature, but without the need for approval of the legislature's action by the governor of the State.

(b) Questions concerning the State legislature procedure and the validity of the adoption of a State resolution cognizable under this Act shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts.

*Transmittal of Applications*

SEC. 4(a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution.

(2) the exact text of the resolution, signed by the presiding officer of each house of the State legislature, and

(3) the date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets for the text of the resolution.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Represen-

tatives shall report to the House of which he is presiding officer, identifying the State making application, the subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall cause copies of such application to be sent to the presiding officer of each House of the legislature of every other State and to each member of the Senate and House of Representatives of the Congress of the United States.

*Effective Period of Applications*

SEC. 5(a) An application submitted to the Congress by a State pursuant to this Act, unless sooner rescinded by the State legislature, shall remain effective for four calendar years after the date it is received by the Congress, except that whenever the Congress determines that within a period of four calendar years two-thirds or more of the several States have each submitted a valid application calling for a constitutional convention on the same subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 8, calling for a constitutional convention.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission in conformity with the procedure specified in sections 3 and 4, except that no such rescission shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subject.

(c) Questions concerning the rescission of a State's application shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

*Calling of a Constitutional Convention*

SEC. 6(a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject. Whenever the Secretary or the Clerk has reason to believe that valid applications made by two-thirds or more of the States with respect to the same subject are in effect, he shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce upon the floor of the House of which he is an officer the substance of such report. Pursuant to such rules as such House may adopt, it shall be the duty of such House to determine whether the recitation contained in any such report is correct. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the

calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention; (2) set forth the nature of the amendment or amendments for the consideration of which the convention is called; and (3) authorize the appropriation of moneys for the payment of all expenses of the convention, including the compensation of delegates and employees. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the presiding officer of each House of the Legislature of each State.

(b) The convention shall be convened not later than one year after the adoption of the resolution.

*Delegates*

SEC. 7(a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each Congressional district in the manner provided by State law. Any vacancy occurring in a State delegation shall be filled by appointment of the Governor of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate elected or appointed by the Governor pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation for each day of service and shall be compensated for traveling and related expenses. Provision shall be made therefore in the concurrent resolution calling the convention. The convention shall fix the compensation of employees of the convention.

*Convening the Convention*

SEC. 8(a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe an oath not to attempt to change or alter any section, clause or article of the Constitution or propose additions thereto except in conformity with the concurrent resolution calling the convention. Upon the election of permanent officers of the convention, the names of such officers

shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) The Congress shall appropriate moneys for the payment of all expenses of the convention.

(c) Under such regulations as the President shall prescribe, the Administrator of General Services shall provide such facilities, and each executive department and agency shall provide such information, as the convention may require, upon written request made by the elected presiding officer of the convention.

*Procedures of the Convention*

SEC. 9(a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The votes of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

*Proposal of Amendments*

SEC. 10(a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a vote of a majority of the total number of delegates to the convention.

(b) No convention called under this Act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including state and Federal courts.

*Approval by the Congress and Transmittal to the States for Ratification*

SEC. 11(a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit the exact text of any amendment or amendments agreed upon by the convention to the Congress for approval and transmittal to the several States for their ratification.

(b) The Congress, before the expiration of the first period of

three months of continuous session following receipt of any proposed amendment, shall, by concurrent resolution, transmit such proposed amendment to the States for ratification, prescribing the time within which such amendment shall be ratified or deemed inoperative and the manner in which such amendment shall be ratified in accordance with Article V of the Constitution: *Provided,* that, within such period, the Congress may, by concurrent resolution, disapprove the submission of the proposed amendment to the States for ratification on the ground that its general nature is different from that stated in the concurrent resolution calling the convention or that the proposal of the amendment by the convention was not in conformity with the provisions of this Act: *Provided* further, that the Congress shall not disapprove the submission of a proposed amendment for ratification by the States because of its substantive provisions.

(c) If, upon the expiration of the period prescribed in the preceding subsection, the Congress has not adopted a concurrent resolution transmitting or disapproving the transmittal of a proposed amendment to the States for ratification, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such proposed amendment to the Administrator of General Services for submission to the States. The Administrator of General Services shall transmit exact copies of the same, together with his certification thereof, to the legislatures of the several States.

*Ratification of Proposed Amendments*

SEC. 12(a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the State legislatures shall adopt their own rules of procedure. Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(c) Any proposed amendment transmitted to the States pursuant to the provisions of section 11(c) of this Act shall be ratified by the legislatures of three-fourths of the several States within seven years of the date of transmittal or be deemed inoperative.

(d) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

*Rescission of Ratifications*

SEC. 13(a) Any State may rescind its ratification of a proposed

amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

(c) Questions concerning State ratification or rejection of amendments proposed to the Constitution of the United States shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

*Proclamation of Constitutional Amendments*

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

*Effective Date of Amendments*

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

# The Lords & Givers of Life

*James F. Csank*

THE DECISION of the United States Supreme Court on January 22, 1973, in the "abortion cases," one arising in Texas, the other in Georgia,[1] has been called by William F. Buckley among others, the "Dred Scott decision[2] of the Twentieth Century." It is an apt description, for the two cases are similar in a number of respects, including the following: the court's approach in each case was primarily historical (consisting of a review of developments in the areas, respectively, of abortion and slavery); each court was highly selective in its use of historical evidence; each court treated as unimportant a number of procedural and technical matters; and each court decided some issues not directly related to the legal questions presented.

There are other parallels. The issue in each case involved basic questions of the meaning of America's past, its beliefs about itself, and its direction for the future; issues which the court either could not or would not acknowledge. The Supreme Court in each case was deciding a sensitive question, upon which various segments of the community were already divided. The underlying conflict was ignored, even if recognized. The latter conflict is inherent in America, arising from a tension between the earliest and most fundamental documents in American history: the Declaration of Independence, with its emphasis on abstract truths, and the Constitution, with its emphasis on procedural stability.

This article is a critique of the *Roe* case, weaving the warp of the abortion decision with the woof of the slavery case, in order to bring these similarities to light. The argument is meant to be an analogy, and if it is valid, the position of the Dred Scott case as the worst decision in the history of the Supreme Court will be shared by *Roe*.[3]

## *I. The Facts of the Cases*

*Roe v. Wade.* Roe is the pseudonym by which an unmarried but

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pregnant lady enters the history books. Wishing to terminate her pregnancy, she instituted a suit in a United States District Court in Texas, challenging that state's law, which made it a crime to perform an abortion unless it was necessary to save the life of the mother. Whatever her reasons, Roe's life and health were not among them, for she admitted in the papers she filed that she was not endangered by the pregnancy.

Roe was joined in her suit by a doctor, against whom there were at that time two pending prosecutions for alleged violations of the Texas abortion statute.

In a separate proceeding, later joined for hearing with that of Roe and the doctor, a married couple calling themselves (what else?) the Does also challenged the same law. The Does alleged that, while the Mrs. was not pregnant and did not want to become pregnant for health reasons, she very well might become pregnant in the usual manner, and if she did, they would like the freedom to terminate that pregnancy.

Roe and the Does complained that the Texas abortion law, by restricting abortion to cases where it was necessary to save the life of the mother, invaded their respective rights of personal and of marital privacy, and that it was unconstitutionally vague.[4] The doctor's claim was essentially the same, with the emphasis on his right to advise his patients without interference by the state.

At the consolidated hearing, the lower federal court dismissed the Does' case, and went on to find, and issue an order, that the Texas law was unconstitutional and therefore could not be enforced by the Texas prosecutorial authorities. Everybody appealed.

*Dred Scott v. Sandford.* The facts in this case are more complicated, and more substantial. Scott was a slave, whose master, a Doctor Emerson, was employed by the United States Army. In 1836, Emerson was transferred from Missouri (a slave state) to an army base in the free state of Illinois, and among the items of property which he took with him when he moved was Scott. Approximately two years later, Emerson was again transferred, this time to Wisconsin Territory, and again Scott went with him. The Territory was "free" under the provisions of the law of 1820 known as the Missouri Compromise, forbidding slavery in any area then held by the United States north of the line 36 degrees 30 minutes. After residing there for another two year period, Scott and his master returned to Missouri.

Scott brought an action in the Missouri state courts, alleging that

his residence on free soil for approximately four years had resulted in his emancipation. The Missouri Supreme Court ruled that it did not have to give effect to Illinois law or to the federal territorial law, both of which provided that the residence of a slave in the respective jurisdictions operated to free him. Rather, Missouri law controlled, and under that law, said the court, Scott was still a slave.

In the meantime, Scott was sold by Emerson to one Sandford, a resident of New York, for the purpose of establishing different state citizenships between Scott and his master, and therefore entitling the former to bring suit in the federal courts based on diversity of citizenship. In this new case, Scott alleged that he was a citizen of Missouri, that Sandford was a resident of New York, and that Scott was a free man. Sandford replied that, since Scott was a Negro and the descendant of Negroes who had been imported into this country as slaves, he could not be a citizen. Hence, having no jurisdiction, the federal court could not hear the case. The lower federal court ruled in Scott's favor on the issue of citizenship, but after a hearing on the question of his status, ruled in favor of Sandford. Scott appealed.

## *II. The Decisions*

*Roe v. Wade.* The court ruled that the Texas law was indeed an unconstitutional invasion of Roe's right of privacy. While the state has interests to protect in the abortion area, interests regarding the time, place, and manner of performing an abortion, and interests in the protection of fetal life, it was the Supreme Court's judgment that these interests were not sufficiently "compelling," *i.e.* important, to justify such a sweeping restriction on the availability of abortions as that imposed by Texas. The woman's "right of privacy" was found in or read into the Fourteenth Amendment of the U.S. Constitution, which prohibits any state from depriving its citizens of life, liberty, or property without due process of law; the decision to abort was considered a matter of personal liberty, which could not be unduly restricted by the states. Justice Blackmun, writing the opinion of the court, laid down specific guidelines to help the states in writing abortion laws: 1) in the first three months of pregnancy, the decision whether or not to abort "must be left to the medical judgment of the pregnant woman's physician"; 2) for the remaining months of gestation, the state might regulate the licensing and qualifications of the person performing the operation; 3) after the fetus reached the stage of viability, that is, when it was capable of meaningful life outside the womb, the state might, if it chose, prohibit abortions altogether,

except when necessary for the preservation of the life or health of the mother. The court was not very specific about just when viability was reached, but the earliest time appears to be after twenty-four weeks.

*Dred Scott v. Sandford.* The court, in an opinion written by Chief Justice Taney, held that a black, whether free or slave, could not be a citizen, and hence had no standing to bring suit in a federal court; that Missouri law did control the question of Scott's status, and since that law had declared him to be a slave, a slave he was; and finally, that Congress had no power to prohibit slavery in the territorial possessions of the United States, and that its 1820 attempt to do so was unconstitutional.

## *III. Critique of Roe v. Wade*

*Preliminaries and Technicalities.* At the outset, the Supreme Court was faced with certain technical, procedural problems, the solution of which is of interest mainly to the attorney. They will be mentioned here, not for whatever bearing they may have on the judicial process as a process, but for their bearing as evidence of the court's desire to decide the abortion controversy.

In Section III of his opinion, Blackmun states that proper procedure, or at least preferred procedure, for bringing a case before the Supreme Court was not followed. Indicative of what follows, the court brushed aside the technicalities, on the grounds that to require technical preciseness would be "destructive of time and energy."

The court spent more time on the doctrines of justiciability and of standing. Briefly, these two doctrines serve as self-imposed restrictions on the exercise of the judicial power; they are adhered to when the court wishes to avoid a decision on the "merits," that is, on the problem presented for review; and they are ignored when the court wishes to decide the case. Justiciability has reference to the type of case before the court, and the doctrine requires an affirmative answer to the question: does the factual situation involved give rise to the type of conflict or dispute which courts in the past have resolved and should continue to resolve? Standing has reference to the parties to the case, and that doctrine requires an affirmative answer to both the following questions: does the case involve a real conflict of interest between the parties? and, do the parties have a personal stake, something to win or lose, in the dispute and its outcome?

With regard to the married couple, the court found neither justic-

iability nor standing. The detriment to their interest of which they complained in the court below was of such a speculative character and was so remote that they were not adversely affected by the Texas law, and might never be so affected. With regard to the doctor, he had a justiciable interest in the case arising from the fact that he faced two prosecutions for alleged violations of the law; but since all the questions he raised in his suit could be employed as defenses to the prosecutions, it was not necessary for the Supreme Court to decide his issues directly. Hence he had no standing, as far as the federal courts were concerned. Besides which, we must remember, the actual decisions of the court in Roe's case would also be a complete defense to the doctor in trials he faced, and would also be a complete granting of the relief sought by the Does.

The court held that Roe had presented a justiciable controversy and that she had standing to contest the existing Texas law. As the facts existed in 1970, when she filed her complaint in the lower court, Roe was a pregnant woman, whose desire for an abortion was "thwarted" by Texas, and thus the state law operated to her detriment. This satisfied the standing requirement. The fact that Roe was not pregnant in January of 1973, or at least not pregnant with the same fetus, was brushed aside; never mind that she had either obtained an illegal abortion in Texas, a legal abortion somewhere else, had lost the fetus through natural causes, or had given birth to a bouncing baby boy or girl sometime in 1970. Because the court wanted to hear and decide the case, it ignored a doctrine related to those above, that of mootness, which states that there must be an actual controversy existing between the parties, not only at the time of the lower court proceedings, but at each appellate level. If the controversy is settled or otherwise disposed of between stages of litigation, the case is said to be "moot." This doctrine provides the court with another convenient loophole through which it can avoid taking a stand.

The explanation given by the court for ignoring the doctine of mootness and for finding that Roe had standing was simply that, given the human gestation period, no case in which pregnancy was involved could possibly wind its way through the courts in time to reach the highest level before that pregnancy was ended. Therefore, if the court were to decide a case in which pregnancy was a significant factor, it had no choice but to ignore the technicalities of mootness and of standing. None of this, however, has any bearing on the question of justiciability, on the question of whether cases involving pregnancy *should* be and *can* be settled by court action. This ques-

tion the court never discusses; it merely assumes that such controversies are and should be entitled to judicial scrutiny. Said Blackmun:

> Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion placed some emphasis upon, medical and medical-legal history, and what that history reveals about man's attitudes toward the abortion procedure over the centuries.[5]

Note the "of course." *Why* is it the court's task to decide? Was Blackmun so convinced of the propriety of the court's getting involved in the abortion controversy, and so convinced that the country agreed with him, that he felt no need to explain? Or was he unable to do so, therefore having to slide over the question by writing as if he felt convinced?

In the second and third paragraphs of the opinion (discussed in detail below), Blackmun acknowledged the vigor of the contesting views regarding abortion. Given this diversity and the depth of the conflict, why does the court arrogate to itself the power to issue what it hopes to be a final solution? Why should not the controversy be left to the action and reaction of the political arena? Why not leave the individual states free to set their own law, rather than impose a set of rigid guidelines applicable to all fifty states?

Until recently the Supreme Court declined to consider certain cases, such as those arising out of apportionment schemes and congressional redistricting, on the grounds that they involved political questions, not suitable to judicial fiat, but best left to the ebb and flow of politics. In this area, the court has now acted, imposing by its decisions the principle of "one-man, one-vote," and thus forbidding at least the most blatant forms of gerrymandering. But the principle of "one-man, one-vote" was one to which lip-service was given, even by those who were most adept at refusing to adopt it in practice; this may have been an unstated but nonetheless important reason for the court's entering the field.

But the abortion controversy is not so superficial. It would seem that the deeper the controversy, the greater the feelings on each side, the greater the sincerity with which opposing views are held, the less proper is a judicial decree attempting to end the strife.

If the court had availed itself to any one or more of the restrictive doctrines we have been discussing to dispose of the case, it would have been an example of a self-denial rarely seen in Washington, D.C. during the past twenty years.

Logically and consistently, the court treated both Roe and the Does identically. It viewed the position of each as it existed at the time of the original filing, and took cognizance in neither case of any developments between that time and the time of its decision. Yet this does not change the complexion of the case actually before it. That case involved symbols: Roe was a symbol of women in general; Texas was a symbol of the states in general; and its abortion statute was a symbol of all such legislation.

The *Dred Scott* case, too, had its share of preliminaries and technicalities. There was the "plea to the jurisdiction" of the court below, Sandford's defense that, since Scott was black, he was not a citizen and could not bring suit in the federal court. The trial court ruled against Sandford on this preliminary question, but later, on the facts, ruled in Sandford's favor by holding that Scott was still a slave. When Scott appealed this ruling, and this ruling only, the question arose as to the power of the Supreme Court to review the ruling on Sandford's plea to the jurisdiction. If the court had the power to review that question, and reversed the lower court, did that dispose of the case, so that it became unnecessary to review the "merits?" Or should the court review the whole file?

Here again, the court decided the way it wanted to decide. The lower court had no jurisdiction; it had been wrong to overrule Sandford's plea. Taney could have sent the case back to the lower court, with instructions to dismiss the entire proceeding, thus depriving the lower court of any authority to rule on the merits. But Taney went on to hold that the court must also review the merits of the case, so that a complete determination could be had at the highest level, thus giving himself and the six justices who agreed with him the opportunity to rule as they desired on the more basic issues.

*Prejudices and Predilections.* The introductory portion of Blackmun's opinion in the Roe case reveals his awareness that the court was about to handle a political bombshell. Blackmun attempts to justify the court's decision to decide and to ameliorate the impact, both of the decision itself and of the court's acting at all, on those who would disagree with either or both of the court's acts. But in doing so, he reveals the secular, humanistic philosophy he and most of his colleagues hold.

Though it may call upon, and in the past has called upon, the executive branch of the federal government to enforce its decrees, the Supreme Court prefers to win acceptance of its decisions by persuasion and by drawing on the reserve of moral authority it has

built up over the years. "The pen is mightier than the sword" is a cliché, but nonetheless true; and it is a cliché that the court believes in. It is an accepted, indeed indispensable, tactic of the rhetorical arts to define not only your own position, but that of your opponent, in such a manner as to subtly influence your neutral audience. As rhetoricians, the justices of the Supreme Court are not above "damning with faint praise."

The Texas abortion statute is "over a century old," while that of Georgia[6] has a *"modern cast,"* reflecting the influence of *"recent"* attitudinal changes, of *advancing* medical knowledge and techniques, and of *new* thinking about an *old* issue. The court acknowledges its "awareness of the sensitive and *emotional* nature of the abortion controversy, of the *vigorous* opposing views, . . . and of the deep and *seemingly* absolute convictions" the subject raises. Blackmun lists the factors operating in this area: "*one's* philosophy, *one's* experiences, *one's* exposure to the raw edges of human existence, *one's* religious *training, one's* attitudes toward life and family and their values, and the moral standards *one* establishes and seeks to observe. . . ."

Blackmun's own attitude toward these factors appears to be condescension. Little weight is to be given to them. Why? Because they are all so subjective. They all "color one's thinking." Clearly, in this context, "to color" means "to cause to appear different from the reality; or to give a special character or distinguishing quality to"[7]; both highly subjective, both highly personal. What, indeed, could be more subjective, *i.e.* less susceptible to scientific measurement, classification, and verification, than "one's philosophy," "one's attitudes"? The fact that millions share the philosophy or attitude is of no concern. If it is not scientific, it is tolerable, but it deserves nothing more. Religion? This is merely "training," like a Pavlovian dog which salivates when the bell is rung, except that humans, on hearing a bell, genuflect or bless themselves. Morality? This is merely a name for the standards "one" establishes for himself. Honor to him who does set up such standards and who abides by them, but they are *his,* not ours, not mine; they have no objective existence or validity.

Other factors operate on the abortion question: scientifically verifiable factors, such as pollution, over-population, poverty, and racial feelings. Philosophy, religion, and ethics are one thing; sociology, anthropology, and ecology are another.

"Free of emotion and of predilection." Well, of course, emotions, being completely personal and subjective, are undesirable. No predil-

ection either, for we must approach the problem with open minds. But is the court doing so? Does not Blackmun reveal his predilections? And is the predilection the court asks that we leave behind that which arises from "one's philosophy, one's religious training, and the moral standards one establishes"?

The 1857 Supreme Court displayed its own set of prejudices and predilections in the *Dred Scott* case. While racial prejudice may have influenced some of the justices, there is no doubt that the overriding bias was of the sectional type.[8] Of the nine justices, five were from slave states; they, together with one justice from New York and one from Pennsylvania, constituted the seven-to-two majority. Chief Justice Taney's opinion sets forth a number of times the conception of the Negro as an inferior being, with no rights which the white man was bound to respect, with no rights other than those which the white man might choose to grant him.[9] The sectional slant is evident in the court's ruling that Missouri law was applicable to the question of Scott's status, that federal legislation prohibiting slavery in the territories was unconstitutional, and that Illinois law could be safely ignored.

Of course, it is not impossible that the Supreme Court, in each decision, acted in the sincere belief that it was both necessary and wise for it to assume the responsibility of deciding the respective issues presented. That the court considered it its duty in each case to remove from the political arena a burning and potentially destructive issue, and that its decision to rule on the case was an act of statesmanship, is quite likely.

The problem with such statecraft is that it imposes on the question involved a legal straight jacket; it renders it impossible for the issue to undergo any evolution at the hands of the people and their representatives; and it negates the possibility of the establishment by the political process of an equilibrium between the opposing positions, with which both sides can live. The solution, imposed from outside that process, becomes rigid.

In *Dred Scott,* the court attempted to settle a basic issue: the status of the black man in American society, whether free or slave. By saying that no black man could be a citizen of a state of the United States, the court effectively closed the door to peaceful evolution. It encased blacks in a limbo: they may not always be slaves, but they will never be members of our community. It was to this aspect of the decision that Lincoln most objected.[10]

According to Lincoln, the Founding Fathers had been successful in their revolution because they had retained control of it; they had

made a political, not a social, revolution. Their theoretical wisdom consisted in knowing the difference; their practical wisdom exhibited itself in the change of their political masters, without attempting to change the structure of the society in whose name they acted. They were afraid of a social revolution, and their fears were confirmed by developments in France a decade later.

Knowing that society must change in order to survive, the Founders established certain goals always to be kept in sight, even if never completely attained. They were the goals toward which the society should move, and they were embodied in the second paragraph of the Declaration of Independence.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness.

They knew too that this ideal could not be attained at once, and that any attempt to do so would destroy what had been achieved and could delay that which might be achieved. The Founders, in establishing their government, tried to strike a balance between authority strong enough and stable enough to hold the society together yet responsive enough to grow, and bend, with a free people.

It was an article of faith with Lincoln that one of the possible changes to which the Founders left the society open was the death of slavery and the eventual acceptance of the black man as a political equal. The *Dred Scott* decision was a closing of this door, a blocking of this growth.[11] In one case involving one man, the court had attempted to keep the black man down forever. This was in itself a social revolution, an imposition of an "ideal" in one quick and irreversible act.

Lincoln's opponents, whether the pro-slavery men or the "popular sovereignty men" like Douglas, always stood on the Constitution, always dated the founding of America in 1787 or 1789. In Lincoln's eyes, "America" was born in 1776; the nation preceded its government by thirteen years. While it would not be accurate to say that, to Lincoln, the Declaration was greater or of more importance than the Constitution, it is true that he found the meaning of the latter in the former.

In its abortion decision, the Supreme Court has attempted a similar social revolution. It has tried again to settle a burning controversy by imposing on the entire nation a set of boundaries. If the court is sincere in its statement that it "need not resolve the difficult question of when life begins,"[12] the court's basic position is one of agnosticism; it is a splendid example of the application of the "all questions

are open questions" dogma. It is not surprising that the court in *Roe* never mentions the Declaration of Independence. As often as that document is used as a basis for political opinions and as a justification for political goals, those who use it rarely remind us that, to its author and to its signers, all questions were *not* open questions; that there are indeed certain *truths* which are *self-evident.* A less agnostic statement can hardly be discovered in American history.

By completely ignoring the Declaration and the possibility that its ideals may still have validity to our society, as well as by its agnosticism, the Blackmun Court has revealed a moral blindness which provides a most significant parallel with the import of the *Dred Scott* decision.[13]

*The Court's Use of History.* It has been pointed out that the court's understanding of the moral standards regarding abortion in ancient times is "partial and defective."[14] Our purpose here is not to review the historical evidence which the court either used or ignored, but to discuss how the panel used it or ignored it.

The oldest and most unambiguous prohibition of abortion is still with us; this prohibition is so well-known that the court had no choice but to take cognizance of it. And since this bit of evidence was *contra* the court's position, the prohibition had to be derogated. I refer to the Hippocratic Oath.

After acknowledging the leading position of Hippocrates in the history of medicine, and after paying lip-service to the oath's continuing influence, calling it "the apex of the development of strict ethical concepts in medicine," the court strains itself to reduce the oath to a "manifesto," denying that it represents "the expression of an absolute standard of medical conduct."[15] This is accomplished by showing that the oath arose from the Pythagoreans, a small sect of ancient philosophers. The oath was not adhered to even in its author's own day, and it was not until the appearance of Christianity that the oath became widely known and generally accepted. With an almost audible sigh of relief, the court accepts the above "theory" as a "satisfactory and acceptable explanation of the oath's apparent rigidity."

Our previous discussion of the methodology of rhetoric, as employed by the court, is relevant here. In its treatment of the oath, the Blackmun opinion uses words of description which are motivated by its desire to belittle its appeal to our enlightened age. The belief of the Pythagoreans that life began at conception was a "dogma"; the oath itself is "uncompromising" and "austere." It is merely a "mani-

festo," attempting to impose an "absolute standard of medical conduct."

This semantic down-grading is only one tactic employed by Blackmun, and the more obvious and least offensive one at that. The entire discussion of the oath is weak, permeated as it is by confusion, amorality, or both. When the opinion states that "the oath was not uncontested even in Hippocrates' day," that "it certainly was not accepted by all ancient physicians,"[16] and that there is "evidence of the violation of every one of its injunctions," the writer of that opinion is revealing either his utilitarianism or his agnosticism. If Blackmun is merely confusing the objective validity and worth of a moral standard with the popularity and acceptance which that standard wins in the community, he is a utilitarian; if, however, he is saying that no moral standard has any objective validity or worth, or that one standard is just as good as another, he is an agnostic.

There is ample evidence of the violation of every one of the injunctions of the Ten Commandments. The accepted American theory of the moral value of free, democratic government is not uncontested, even in Blackmun's day, just as the moral blameworthiness of slavery was not accepted by all public figures in Lincoln's time. Following Blackmun's reasoning, the Ten Commandments, democracy, and the end of slavery have no meaning other than being historical accidents; none of them have objective validity or worth; none of them are of didactic value.

A person does not have to follow, or even understand, the works of Marx or Teilhard to believe in an historical evolution, by which is meant simply a recognizable growth or development in various cultural attitudes and institutions over a period of time. An obvious example is the evolution of the moral attitude toward slavery; another is the change in the emphasis of political theory, from monarchy to aristocracy to democracy. Our Supreme Court would be among the first to acknowledge such an evolution in, *e.g.*, our beliefs concerning race relations, and in theories concerning the state's duty to care for its citizens. (The court no doubt prides itself on being among the causes of such developments.) And it would be among the first to prevent any attempted "reverse" evolution, *e.g.*, a return to slavery. Why then was it moved to ignore an analogous development in the attitude of the law toward the unborn?

To Plato, the aborting of a fetus was as acceptable as the exposure of a deformed infant. At common law, an abortion performed before quickening, before life in the empirically verifiable form of movement was not a crime;[17] after the time of quickening, the common

law recognized abortion as either a felony or as a misdemeanor. By statute in many states, prior to the *Roe* case, the abortion of a fetus at any stage of development was a felony. Further distinctions have been added by statutory enactments, both in England and in America: abortion was not criminally punishable if performed to save the life of the mother; the mother's "life" was later widened to include health, both physical and mental; and still another development occurred as the result of recent advances in the speciality of embryology, when it became possible in some cases to predict that a particular fetus was deformed or would be born handicapped. In response to this development, some statutes excepted from the general prohibition of abortions those performed to prevent such births.

All of this appears in Blackmun's opinion, including references to two documents of the American Medical Association, one dated 1859, the other 1870, both of which condemned abortion primarily on the grounds that the unborn "child" was a living, human, being.[18]

Jumping ahead almost a century, the next developments of which the court takes notice are the recent changes in the position of the American Medical Association, the American Public Health Association, and the American Bar Association. These groups, the first two in 1970, the last in 1972, issued reports and made recommendations which treated abortion as just another medical procedure. The only standards to be applied are procedural standards: the qualifications and licensing of doctors and hospitals, the availability of emergency treatment, the availability of counseling, and the dispensing of contraceptive information.

In the view of the court, these twentieth-century developments do not constitute a continuation of our society's evolution in its attitudes toward abortion. If at common law abortion was not a crime, or at least not a serious crime, then a woman had, at common law, a greater freedom to obtain an induced end to her pregnancy than she has at present. The state statutory prohibitions of abortions came about, as the court repeatedly emphasizes, "only" in the nineteenth century, and rather than being a continuation and advancement of an evolution, they constitute only a widespread aberration, which interfered with the growing area of personal liberty. The recent changes in the attitudes of the groups named above are representative of a desire in the community as a whole to return to the "Golden Age of Freedom to Abort." But now, of course, this freedom is even more meaningful, since the advances in medicine have made it safer and easier to procure the operation. Surely, in our day of antiseptics and anesthetics, a woman's right to an abortion should not be more

restricted than in the days of the common law, when the procedure was dangerous. God is Science, Science is Knowledge, and Knowledge will make us all free.

If one reads all 240 pages of the *Dred Scott* decision, one is struck by the contrast between history as used by the majority and history as used by the dissenters. Space does not permit a full analysis, but a few examples will illustrate the dichotomy. Both sides extrapolated the historical evidence which supported their positions, the majority emphasizing the statutes and court decisions regulating the black man, free or slave, and restricting the rights and privileges to which he was entitled; the minority emphasizing the spreading moral condemnation of slavery and the growing tendency to find emancipation in particular cases, the master's lack of intent to emancipate notwithstanding. Evidence that could not be ignored was attributed by the different writers to different motives; *e.g.,* the abolition of slavery in the North was claimed by Taney, writing for the majority, to be the result of climatic and economic conditions prevailing there, while the dissenters claimed that it was the result of the realization of the moral evils of the institution. A final example shows that arguments based on semantics were not unknown to the earlier court. The Constitution gave Congress the power to make "all needful rules and regulations respecting the territory and other property of the United States." It was under this provision that Congress, in 1820, had claimed the power to prohibit the introduction of slavery into the remaining portion of the territory included in the Louisiana Purchase. According to Taney, the word "territory" could only have applied to such areas as the United States possessed at the time of the adoption of the Constitution; since the Wisconsin Territory was added to the domain of the nation in 1803, the word "territory" could not have had reference to it, and the clause under consideration could not have given Congress the power to make "all" needful rules and regulations for Louisiana.

If the Constitution is what the Supreme Court says it is, then history, when used to interpret the Constitution, is also what the Supreme Court says it is. Insofar as the interest of the nation and of the two sections of the nation in 1857 concerned slavery, the Supreme Court attempted to elevate the sectional interests of the South over the sectional interest of the North and of the federal government. Until its decision in *Dred Scott v. Emerson,* the Missouri Supreme Court had recognized and given "full faith and credit" to that provision of the Illinois law which operated to emancipate any slave held by a resident master within the jurisdiction of that state.

But in that case, the Missouri Court frankly refused to follow its own precedents, and frankly stated the reason for its change: "that times are not as they were when the former decisions on this subject were made,"[19] or, as the reason was characterized by Justice McLean in his dissent, the state court was "influenced, as declared, by a determination to counteract the excitement against slavery in the free states."[20] This was a commendable honesty, but it must have appeared as a slap in the face to the North; for consider that, after *Dred Scott,* the Southern states were free to ignore the law of Northern states as it affected the status of blacks; but that the Northern states were not granted a similar liberty, because of the "fugitive slave law" and the provision of the Constitution on which it was based, requiring all state governments to return runaway slaves to their rightful owners upon application.[21]

The present Supreme Court, in the abortion case, has invalidated at least thirty-one state laws restricting abortion,[22] and has imposed federal guidelines for any future enactments in this field. The imposition of these guidelines effectively negates the possibility of future development. We can only wonder if Blackmun's references to "recent attitudinal changes" and to "new thinking" about the old issue of abortion is his oblique way of stating the court's response to such political influences as the Women's Lib. Movement.

The court's disquisition on the history of abortion is meant to establish that: 1) at common law, a woman had more freedom to procure an abortion without worry or criminal prosecution than she now has; 2) state laws restricting abortions are grounded on one or more of the following reasons: a) they are meant to enforce a Victorian code of sexual conduct; b) they are designed primarily to deter the woman from submitting herself to a hazardous operation; or c) they are designed to protect pre-natal life; but 3) reason a) is no longer valid (the court disposes of this reason just that curtly); reason b) is out-dated, due to the advances in medical procedures and techniques; reason c) is not an historical reason, and its discussion and disposition comes later.

Therefore, from the point of view of history, there is no good reason to restrict the availability of abortions to a degree not found in earlier times.

At this point, however, the court had yet to dispose of the "protection of pre-natal life" justification of state anti-abortion statutes. Assuming that it did so, it still left unanswered the basic questions of whether and why a woman has a right to seek and obtain an abortion.

*The Court's Law.* Blackmun's opinion starts its discussion of the legal issues with a statement that the right of personal privacy does exist, even though it is nowhere explicitly mentioned in the Constitution. This right has been found in or read into various provisions of that document, but the one the court prefers is the Fourteenth Amendment's "concept of personal liberty and restrictions upon State action." The opinion makes it clear that only those personal rights that are "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of personal privacy, and that this right "has some extension" to activities concerning one's family, spouse, and children. It simply extends the right of personal privacy to encompass a woman's decision whether or not to terminate her pregnancy.

By "right of privacy," the Supreme Court means something quite different from "the right of an individual to be let alone, to live a life of seclusion, or to be free from unwarranted publicity."[23] Though it does not define what it means, the court's understanding of this right can be pieced together from its discussion in *Roe:* the right of privacy protected by the Fourteenth Amendment is a guarantee that certain fundamental rights, those implicit in the concept of ordered liberty, will not be restricted by state action, unless the exercise of the fundamental rights is outweighed by a "compelling interest," on the part of the state, in restricting its exercise.[24] If this is an accurate description, the court's finding that the right of privacy includes a woman's decision to have an abortion is misleading; rather, the court's ruling is that "the right of privacy guarantees that the fundamental right to an abortion will not be restricted by state action, unless the exercise of the right to an abortion is outweighed by a compelling state interest in restricting that exercise." In order to clarify the distinction, and to show that it does indeed make a difference, consider an analogy.

In the comfort and seclusion (let us say, in the privacy) of my home, I read and enjoy pornography. The law does not interfere with my doing so. If a publication is deemed by the authorities to be pornographic, and therefore not entitled to the protection of the First Amendment, the publication will be banned or confiscated, and I shall no longer be able to enjoy my pastime. My "right of privacy" has not been violated; no personal right of mine has been denied, for I do not have a *right* to read pornography. If I had such a right, then the law could not destroy my right or render it unexercisable by banning or confiscating the publication, or prosecuting the pornographer.

So, too, in the abortion area. Roe wished to have such an operation; the law declared such operations to be, for the most part, illegal, and acted to deter doctors from performing them. Roe too is prevented from doing as she wished, but her "right of privacy" was not violated, nor was any other right, for she had no "right to an abortion." But if Roe does have such a right, then the law cannot validly deter the doctor from operating nor prosecute him for doing so.

This seems to be the most appropriate place to discuss an aspect of the abortion controversy of which the court took notice on a number of occasions, and which was treated as an argument against the validity and enforcement of the Texas statute. The court treated as incongruous the situation of a woman's seeking and obtaining an abortion, with consequent prosecution of the doctor, while the law, in most cases, did not touch the woman. The analysis above supplies an answer: the woman was protected by her "right of privacy," because the law realizes that it cannot control all the actions of a citizen; on the other hand, the abortionist, like the pornographer, makes available that which is forbidden by law. This also explains why some states, e.g., Ohio, prosecute the woman, not under the abortion statute, but under a separate provision which makes her an "aider and abettor." Another consideration is the impossibility of prosecuting a woman under the law of state A, in which she resides and in which abortions are illegal, when the abortion took place in state B, in which the operation is legal.

After *Roe,* the right of privacy does not shelter the woman from prosecution; it shelters her right to an abortion.

Not only does a woman have a right to abort her fetus, but this right is among the most absolute of those protected by law, notwithstanding the court's statement that the "woman's right" is not absolute but must be weighed against important state interests.[25] The following are the considerations applicable to our argument.

The court lists the factors which it feels are involved in the decision to abort.[26] Some of these factors are wholly subjective and stated in such a general manner as to be practically meaningless. Any woman is capable of claiming, some in good faith, some in bad, that the birth of a child will "tax her mental and physical health," or will force on her a "distressful life and future," or will attach the "stigma of unwed motherhood" to her, or will bring an "unwanted child" into the world.

Also, the restrictions which the court allows the state to impose on the abortion procedure are only those which a) affect the state's

compelling interest in regulating medical procedures, practitioners, and facilities in general; or which b) are based on the state's compelling interest (if it finds that it has one) in protecting "potential life." The first imposes no restrictions at all on the woman; in fact, the desirability of obtaining an abortion in a safe manner, in a clean hospital, performed by a qualified physician is one of the major arguments for liberalizing the law, an argument always dramatized by the picture of a gypsy woman in an ill-lit back room with darning needles. Restrictions based on b) may be imposed only in the last two or three months of pregnancy, and then *only if* the life or health of the mother is not in jeopardy. Since a woman who faces the "distress" of an "unwanted child," or the "stigma of unwed motherhood" will be likely to have an abortion before her "six months are up," and since the definition of the woman's "life or health" is broad enough to leave it to her complete discretion whether or not she is endangered, the efficiency of these restrictions is open to serious doubt, if not to outright cynicism.

Some state legislators have apparently understood the *Roe* case better than Chief Justice Burger, who claims that the court has rejected "any claim that the Constitution requires abortions on demand."[27] As an example, Ohio's present "abortion" statute took effect on September 16, 1974, and is found in Chapter 2919 of its Revised Code. The only restriction on obtaining an abortion, from the point of view of availability, is that it be performed with the "informed consent" of the mother, or of the mother's parent or guardian, if the mother is a minor.

In order to determine whether the Texas abortion statutes and all others similarly drawn were valid under the U.S. Constitution, Blackmun applied the "compelling state interest" test. It was primarily over this choice that Justice Rehnquist wrote his separate dissenting opinion;[28] Rehnquist would have asked, not "Does the state have a compelling interest to protect, by restricting the availability of abortion to those cases in which the life of the mother is endangered?", but "Does the Texas restriction of the availability of abortions to such cases bear a rational relation to any interests the state seeks to protect?" The test used in any particular case indicates 1) where the burden of proof rests, with the state (proving that its interest is "compelling") or with the aggrieved party (the state's law has no rational relation to any valid objective of the state); and, related to this, 2) which side of the case received the benefit of any presumption in which the Supreme Court may wish to indulge (is the law considered valid until proven unconstitutional or unconstitu-

tional until proven valid?), and 3) the court's conception of the burden of persuasion its opinion must bear.

As an example of 3) if a present state law disenfranchised all red-headed citizens, the "rational relation" test is sufficient to persuade the public of the unconstitutionality of the statute. The question asked would be, "Does the color of a person's hair bear any rational relation to his exercise of the franchise?" The court would have no difficulty answering "No." (Real cases are rarely so cut and dried.) But where the issues are more complicated the court's burden of persuasion is higher. As it increases the burden of the "losing side," it decreases its own burden. Since the "compelling state interest" test requires more of the state than the "rational relation test," the imposition of the former makes the court seem less arbitrary, less grasping.

We come finally to the court's discussion of the "protection of pre-natal life" reason for the enactment and enforcement of restrictive abortion statutes. The court admits that, if the fetus is a "person," then its right to life is guaranteed by the Fourteenth Amendment, and Roe's case collapses.[29] It is therefore necessary to show that a fetus is not a person," as that word is used in the Constitution. Its first step is to list every provision of that document which uses the word, and to show that, as used, it can only apply post-natally.

"Person" is used three times in the Fourteenth Amendment. "All persons born or naturalized in the United States . . . are citizens" is a definition, and technically only proves that the unborn are not citizens; it does not say nor mean that the unborn are not persons. The meaning of the term as used in the due process clause and the equal protection clause[30] are the very matters which the court is deciding. The other provisions in which the words appear involve: 1) the Constitution's euphemism for "slaves";[31] 2) persons charged with or answerable for crimes;[32] 3) persons qualified to hold office or to serve as electors for office;[33] and 4) the apportionment of representatives.[34]

Briefly, none of these Constitutional provisions has anything to say, one way or the other, about the unborn. This semantic discussion proves nothing, other than that the court was free to decide, as it did, that the word "person" does not include the unborn.

Some of the court's most interesting statements can always be found in its footnotes, and the *Roe* case is no exception. In footnote 54, appearing on page 157 of 410 U.S., Blackmun attempts to bolster the force of his holding by arguing that if a fetus were a

person, entitled to the protection of the Fourteenth Amendment, the Texas law which permits its destruction by an abortion when the life of the mother is endangered is "out of line" with the amendment's command. This argument completely ignores such a basic distinction as that between murder and homicide in self-defense, a distinction of which the Texas statute took notice. The same superficiality is apparent in the court's use of the distinction between the penalty applied by Texas in murder cases and the penalty applied in cases of abortion; again the court fails to distinguish between the different penalties applied to different types of punishable homicide, as it fails to acknowledge that such matters can be left to the discretion of the legislature.[35]

Blackmun disclaims any need to decide the difficult question of when life begins. As justification for this latest example of agnosticism, he cites the failure of medicine, philosophy, and theology to "arrive at any consensus" on this point.[36] Having made this gesture, he goes on to decide that life begins at viability, at that point during gestation at which the fetus becomes "able to live outside the mother's womb, albeit with artificial aid."

Does the court decide when life begins? In order to answer, we have to know what Blackmun meant by "life." Surely, he did not say that biological life begins at viability; nor does he claim that spiritual life or philosophical life begins then. He was certainly right in disclaiming the authority to speak definitively from these points of view. What Blackmun wrote, and what the court decided, was that "meaningful life" begins at viability. Blackmun does not provide his reader with a meaning for "meaningful." But what the court's holding comes to is just this: meaningful life begins at about seven (perhaps six) months into the gestation period as far as the law is concerned; prior to that time life is meaningless, as far as the law is concerned; and that the "right to life" spoken of in the Constitution attaches at that time, though life is present from conception.

When he wrote that the judiciary ". . . is not in a position to speculate as to" when life begins, Blackmun was being disingenuous. "The judiciary" in particular, the law in general, "speculates" regarding the attainment by persons of other stages of life; maturity, for example, which had been speculated to begin at twenty-one, though we are now told it is reached at eighteen. But maturity in many other senses, e.g., the psychological and the biological, is not a matter of such consensus as the courts would like to have. We can only speculate as to why Blackmun specifically denies doing what he then does.

The court's use of the word "meaningful" is an awesome display of hubris. It contains an echo of philosophies that consider certain types of life to be without "meaning" — the life of a Jewish man, a black man, or a deformed child.

Were it not for these considerations, it would be ironic that the court actually uses to further its argument the statement that the law has never recognized the unborn as persons in the whole sense (whatever that means).[37] It would be ironic, for the court probably takes a great deal of pride in its usual practice of attempting to remedy such situations; situations involving the rights of convicts, and questions involving the rights of youths brought into juvenile court being two examples. Given such insincerity, it is nothing less than astounding how the court manages to retain the respect of the country.

In 1857, the Supreme Court gave its imprimatur to one of the contributing factors of the Civil War. Both legally and morally, it encouraged the secessionist leaders of the South in their insistent demand for "state's rights"; legally, by holding that the State of Missouri was free to ignore, on frankly stated political grounds, the full faith and credit clause[38] and the supremacy clause[39] of the Constitution; and was thus free to refuse to acknowledge the effect of Illinois law and of federal territorial legislation on the status of a slave held in residence within those respective jurisdictions; morally by leading the South to believe that the federal government, or at least its judicial arm, would either support the South in pressing its claims or would not oppose the break-up of the union.

Declaring the Missouri Compromise Law of 1820 unconstitutional also provided a legal impetus to the South. The manner of such declaration and the fact that it did not have to be made at all provided further moral encouragement. The holding was unnecessary because a majority of the justices agreed that Missouri Law controlled Scott's status.[40] For political reasons, the court was determined to make its ruling, come hell or high water. Both hell and high water came.

Taney wrote an opinion supported by two of the other justices, in which he declared that a black, whether slave or free, could never be a citizen of any state. Though this did not constitute a direct ruling by the court, its appearance in the "opinion of the court" by the chief justice was meant to, and did, have a momentous impact. ". . . [descendants of slaves] are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instru-

ment provides for and secures to citizens of the United States."[41] On the contrary, "they were at that time (1787) considered as a subordinate and inferior class of beings . . . and, whether emancipated or not . . . had no rights or privileges but such as those who held the power and the government might choose to grant them."[42]

It was not the province of the court, said Taney, to decide whether such a state of affairs is just or unjust. Taney also knew how to deny doing what he was doing. In *Dred Scott*, the justice or injustice of the Founding Fathers' attitudes toward the black man (or rather of Taney's interpretation of that attitude) was not an issue, and therefore not technically decided. Yet in expanding that attitude, in his opinion which appeared, to the average citizen, as the "opinion of the court," Taney was certainly giving the impression that, under the law and the Constitution, that attitude was indeed just. The court in 1857 was just as inclined to enforce its opinions by persuasion rather than by force, as was in the 1973 court.

I have earlier indicated how Taney reached the conclusion that Congress did not have the authority to make "all needful rules" regarding the governing of the territorial possessions of the national government. Since he did not deny that the authority must be in Congress, what grounds did he set to that power? Taney's procedure was as follows: the general principles of our government, such as federalism, limited authority, delegated powers, and powers reserved to the people, are the guiding principles. Congress can only exercise for the territories what it can exercise for the benefit of all. Since Congress has no authority to interfere with private property, since it has no right to prefer one section of the country over another, it follows that Congress has no right to interfere with property in the territories, whether it is the property of a southern man or of a northern man. Therefore, there is no authority or power in Congress to interfere with slavery in any territory.

Further: since the right of property which a master has in his slave is expressly confirmed in the Constitution, Congress has no right to do anything other than protect that right of property. It would be hard to say that Taney is playing with words here without also acknowledging that Lincoln was doing the same when he argued that nowhere in the Constitution does the word "slave" appear. But this is not the important consideration. Taney was being realistic, recognizing that the substance was there, even if the word was not. Lincoln made his argument to prove a consideration which he considered to be essential: that the Fathers contemplated the eventual death of slavery, and did not want the word "slave" or any form of

it to appear in the Constitution to hinder its death or to remind posterity of the former existence of a great evil in this country. Hence the euphemisms: "no person held to service of labor"; "three-fifths of all other persons"; "the migration or importation of such persons as any of the states now existing[43] shall think proper to admit."

Taney stuck to the bare word when it suited his purpose, and looked behind it to the reality when *that* suited his purpose.

The most far-reaching implication of the *Dred Scott* case is the attitude, explicitly stated, that the state is the source of all rights which we may have; that the state may grant or withhold these rights to or from persons belonging to a certain class. Lincoln saw the danger of this in a related context, when he warned that any argument used to justify the enslavement of the black man could also be used to justify the enslavement of whites.[44]

The *Dred Scott* decision was a direct denial both of the truth and of the validity as a goal of our society of that portion of the Declaration of Independence which holds that all men are created equal.

The *Roe v. Wade* decision, with its implicit holding that meaningful life does not exist until the last two or three months of pregnancy, and that the law has the right and power to withhold a "right to life" until that time, is close in spirit to *Dred Scott*. The *Roe* case is a direct denial of the truth and of the validity as a goal of our society of that portion of the Declaration of Independence which holds that "all men . . . are endowed by their Creator with certain unalienable rights, that among these are Life. . . ."

## *IV. The Need for Polarization*

In the life of every organized community, there are a myriad of issues constantly arising that call for resolution within the terms of the judicial and legal process and in accordance with that community's fundamental beliefs about its life, what it has been in the past, what it wishes to be in the future. Some of these issues concern means to an accepted end; some of them concern an attempt to add new beliefs to the society's basic core of values, and to win for these proposed beliefs community acceptance. Without this ebb and flow of issues in the political arena, a community stagnates; it has no movement; it has no life.

From time to time, issues arise which concern, not the means to an accepted end, not the validity of new beliefs, nor the fitness of these new beliefs as additions to the basic values, but the fundamental values themselves. These issues present a direct challenge to the basis of the community's life. Though bound to occur, especially

in a free society, these challenges, when successful, weaken the spirit of the *polis*, for without a core for fundamental beliefs immune to successful challenge, the life of the society has no direction; its movement becomes as uncontrollable and as worthless to the political body as a muscle spasm is to the physical.

One such challenge to the core of America was presented by the Supreme Court in its decision in *Dred Scott v. Sandford*. Because it was such a challenge, Lincoln refused to accept it as final. As the ruling applied to Scott, it was entitled to obedience. But as a holding applicable to all black men, for all time, Lincoln advocated its reversal, not through violence, but through constitutional amendment or change in the membership of the court.

Because he recognized the import of the decision, Lincoln made an issue out of it, throughout his debates with Douglas and after.[45] And because he made an issue out of it, Lincoln can claim the title of Great Polarizer. The issue was deeper than slavery, deeper even than the extension of slavery to the territories, which was only the immediate question.

Having polarized the nation to such an extent that he himself was elected in 1860 as a "Sectional President," Lincoln was faced, between his election and his inauguration, with the choice between negotiating with the South and having to give in on the underlying issue; or of silently waiting, refusing to retreat even as the union divided. If he had done the former, history would have adjudged him a coward without character, and as a seeker of his own aggrandizement. Choosing the course he did, he revealed his strength, his character, and his honesty, not only personally, but politically. Having drawn the line, he accepted even the price of a bloody civil war to sustain the principle for which the line was drawn, and to move closer to the goal represented by the principle.

The *Roe* decision constitutes another crisis, another challenge to a basic belief lying at the core of American society. It is a denial that the right to life is held by all, regardless of the stage of development of that life, and regardless of whether some think it has meaning or not.

Consensus is of value in a democratic society; on most issues, it is not only unnecessary but dangerous and irresponsible to deepen the gulf between conflicting opinions. There are times, however, when lines must be drawn; there are issues, the attempted resolution of which should not be accepted by a meek and quiet acquiescence on the part of the majority.[46]

Today is such a time, and abortion is such an issue.

## NOTES

1. The Texas case is *Roe v. Wade,* 410 U.S. 113 (1973); the Georgia case is *Doe v. Bolton,* 410 U.S. 179 (1973).
2. *Dred Scott v. Sandford,* 60 U.S. 393 (1857).
3. See Allen Nevins, *The Emergence of Lincoln.* (New York; Scribners and Sons, 1950) Vol., I, pp. 117-118.
4. "Vagueness" is a test applied by the courts to determine the validity of criminal statutes. Generally speaking, the test asks whether the language of the statute forbidding certain acts is clear and succinct, and whether it gives to the individual sufficient notice of what future acts of his may be illegal. If not, the statute is said to be unconstitutionally vague, and therefore invalid.
5. *Roe, supra,* n. 1, pp. 116-117.
6. See *Doe v. Bolton,* 410 U.S. 179 (1973).
7. The definitions are from *The Random House Dictionary of the English Language,* 1967, Random House, Inc., New York.
8. Nevins, *op. cit.,* n. 3. chapter 4, *passim.*
9. *Dred Scott, supra,* n. 2. pp. 405, 407, 412-413, 416.
10. To Harry V. Jaffa's *Crisis of the House Divided* (New York: Doubleday, 1959), I owe the basis of this analysis.
11. Lincoln also considered the repeal of the Missouri Compromise, in the Kansas-Nebraska Act of 1854, as a step in the same backward direction.
12. *Roe, supra,* n. 1, p. 159. Whether the court *did* in fact decide that issue is discussed later.
13. In *Dred Scott,* Taney's opinion discusses the import of the language quoted from the Declaration of Independence only to deny its universality and applicability. Albeit by torturous reasoning, Taney held that "all men" could not have included the blacks. It can be assumed that, had the *Roe* Court discussed the phrase, it would have held that "all men" referred only to — what? Males over 18? Only those actually born? It may be that the Court deliberately refused to consider the language, foreseeing a necessity to strain the language as Taney was forced to do.
14. Harold O. J. Brown, "What the Supreme Court Didn't Know," *The Human Life Review,* Spring 1975, p. 5.
15. *Roe, supra,* n. 1, pp. 131-132.
16. A statement that tries to say more than it really does. After all, 99 out of 100 is "not all," yet it is impressive, even if popularity is a reliable indication of the validity of a moral standard.
17. The court's emphasis on this point is rather meaningless. Embezzlement, the wrongful taking or appropriation of another's property by one to whom the property has been entrusted or into whose hands it has lawfully come, was not a crime at common law, since the requirement of a theft, a wrongful taking, by definition could not exist. This defect had to be remedied by statute. See 29A, Corpus Juris Secundum, Embezzlement, Sections 1 & 2.
18. *Roe, supra,* n. 1, pp. 141-142.
19. *Dred Scott, supra,* n. 2, p. 553.
20. *Ibid.,* p. 556.
21. U.S. Constitution, Art. IV, Section 2, Paragraph 2, superseded by Amendment XIII.
22. *Roe, supra,* n. 1, p. 118, footnote 2.
23. See 77 Corpus Juris Secundum, Right of Privacy, Section 1.
24. I do not think this definition is unfair. The court's use of different terms when referring to what is protected by the Fourteenth Amendment — "liberty," "ordered liberty," and "personal liberty and restrictions upon state action" — may be synonymous. Yet the court neither affirms nor denies any synonymity. My definition is paraphrased from the first two paragraphs of Section VIII of the court's opinion, 410, U.S. 113, pp. 152-153.
25. *Roe, supra,* n. 1, p. 154.
26. *Ibid.,* p. 153.
27. *Ibid.,* p. 208.
28. See Rehnquist's dissent in *Roe v. Wade,* 410 U.S. 113, p. 171; also his dissent, again, in *Weber v. Aetna Casualty and Surety Company,* 406, U.S. 164 (1972). p. 177.
29. *Roe, supra,* n. 1, pp. 156-157.
30. ". . . nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

31. The Apportionment Clause, Art. I, Section 2, Cl. 3; The Migration and Importation Clause, Art. I, Section 9, Cl. 1; Fugitive Slave Clause, Art. IV, Section 2, Cl. 3.

32. The Extradition Clauses, Art. III, Section 2, Cl. 2; The Fifth Amendment.

33. Art. I, Section 2, Cl. 2; Art. III, Section 1, Cl. 2 and Cl. 3; Art. II, Section 1, Cl. 5; Twelfth Amendment; Twenty-Second Amendment; Art. I, Section 9, Cl. 8; Fourteenth Amendment.

34. Art. 1, Section 2, Cl. 3; Section 2, Fourteenth Amendment.

35. The Court's handling of the Vuitch case (*U.S. v. Vuitch,* 402 U.S. 62), p. 159 of the *Roe* decision, involves a non-sequitur. In *Vuitch,* the court indulged in statutory interpretation to "save" the District of Columbia abortion statute from an attack of unconstitutionality based on the vagueness of the term "health." The D.C. statute was roughly the same as that of Texas. In *Roe,* the court claimed that its holding supported its position that a fetus is not a person entitled to the protection of the Fourteenth Amendment. This inference is too wide; the *Vuitch* case can be a precedent for the holding that the right to life of a fetus is not absolute. A court's interpretation of a murder statute, excepting from its prohibitions an act of homicide in self-defense, is not an inference that the victim is not a person.

36. Note the democratic implications of "consensus." Note too, another appearance of Blackmun's positivism.

37. 410 U.S. 113, p. 162.

38. Art. IV, Section 1.

39. Art. VI, Section 2.

40. See Nevins, *supra,* n. 3, p. 93.

41. 60 U.S. 393, p. 404.

42. *Ibid.,* p. 405.

43. Is the "now existing" phrase in the Importation Clause another indication that the Fathers did not intend, and did not want to allow, any future states to be slave states with the right to import those persons?

44. *The Collected Works of Abraham Lincoln,* Ray P. Basler, ed., vol. II, pp. 222-223.

45. The "revisionist" school of Lincoln historiography, whose archtype is J.G. Randall's *Lincoln, The President* (Dodd, Mead, and Company, New York, 1945), castigates Lincoln for ignoring all the other issues which could have been discussed in the 1858 Senate campaign, and concentrating only on the issue of slavery. See Randall, *supra,* vol. I, pp. 121-122. This is simply a result of the failure to distinguish between the two types of issues we have discussed, a distinction of which Lincoln never lost sight. See Jaffa, *Crisis of the House Divided, supra,* no. 10.

46. Two months before *Roe* was decided, referenda in Michigan and North Dakota defeated by large margins a proposed liberalization of abortion laws.

# The Slide to Auschwitz

*C. Everett Koop, M.D.*

IN JULY the City Council of Cambridge, Massachusetts, voted to petition Harvard University to temporarily halt the construction of a half million dollar laboratory for specialized genetics research. This intervention of the town in the affairs of the University was not just the hysterical reaction of ignorant people to the misunderstood pursuits of a scientific faculty. Rather, it had been initiated and pushed by distinguished scholars on the Harvard faculty. These individuals were deeply concerned with the newly acquired power in biology to alter the genes of living organisms and create new hybrids of animals and plants, and of viruses, some of them potentially dangerous.

It is the custom of men to be concerned about those things of which they know little at present but where the potential seems to be a threat to all of mankind. This was true of the first atomic bomb; of its successor, the hydrogen bomb; of all of the weaponry to deliver thermonuclear warfare; of biological warfare and of nerve gas. There are even environmentalists who are deeply concerned over the destruction of the ozone by aerosol cans. Yet, each of these potential dangers to mankind is theoretically, if not practically, controllable.

I would like to address you today on another potentially destructive force against mankind which, because of the nature of human beings, may not be controllable until it has inexorably pursued its path of destruction and has come to weigh upon the conscience of so many people that, like a Vietnam war, it must grind to a halt. I am speaking of the growing disregard for life itself. I am speaking of what was called in a more moral, or perhaps a more religious generation, the sanctity of human life. Given the conflicting concerns of our generation — the specter of famine raised by those primarily concerned about population control, the specter of financial

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chaos for the whole world raised by economic pundits, the intrusion of violence as an accepted thing into our culture, and the declining morality in all the affairs of men — it is quite possible that when the inevitable swing of the pendulum takes place and life once again becomes precious, it might be too late to stop the slide that will ultimately herald the decline and demise of our civilization.

I am nearing the end of my thirty-first year in the actual practice of pediatric surgery, longer I think than anyone in this room today. I have had the unusual advantage of growing up with my specialty. It has been for me an extremely satisfying career. One of the most satisfying aspects has been my participation in the rehabilitation of youngsters who were born with congenital anomalies incompatible with life but nevertheless amenable to surgical correction. The surgical correction might have been by a dramatic one-stroke procedure or it may have required years of time and effort, plus further operations, to get the best possible result. At times the best possible result was far from perfect. Yet, I have a sense of satisfaction in my career, best indicated perhaps by the fact that no family has ever come to me and said: "Why did you work so hard to save the life of my child?" And no grown child has ever come back to ask me why, either. On the other hand, in a recent study that I did on twenty-five families, all of whom had had a child with an imperforate anus operated upon by me in the period twenty-five to fifteen years ago, almost every family referred to the experience of raising the defective youngster as a positive one. A few were neutral; none were negative. Some siblings felt that they had not had some of the advantages that they might have had if their brother or sister had been born normal, yet on balance the conclusion from these twenty-five families whom we studied quite extensively was that many of them were better families than they would have been without the necessity of facing the adversity produced by the problems of the imperfect child.

I do not think that I am over the hill, but with mandatory retirement less than five years away it does behoove me to look at the end of my career. As I do it saddens me. But it frightens me too when I see the trends in our society and recognize the acquiescence, if not the *leadership*, of the medical profession down a path which in my judgement leads to destruction.

In January of 1973 the United States Supreme Court declared that a new right existed in the Constitution; namely, the right of a woman to have an abortion on demand. I am not here today to argue the pros or cons of the abortion question, but in a paper I pre-

sented in 1973, I predicted ten consequences of the Supreme Court's decision on abortion that would remarkably — deleteriously — affect the society in which we live.[1] All ten of these prophetic statements have found realization in historical fact.

Without going into all the details, I expressed the concern that abortion of somewhere between a million and two million unborn babies a year would lead to such cheapening of human life that infanticide would not be far behind. Well, you all know that infanticide is being practiced right *now* in this country and I guess the thing that saddens me most about *that* is that it is being practiced by that very segment of our profession which has always stood in the role of advocate for the lives of children.

I am frequently told by people who have never had the experience of working with children who are being rehabilitated into our society after the correction of a congenital defect that infants with such defects should be allowed to die, or even "encouraged" to die, because their lives could obviously be nothing but unhappy and miserable. Yet it has been my constant experience that disability and unhappiness do not necessarily go together. Some of the most unhappy children whom I have known have all of their physical and mental faculties and on the other hand some of the happiest youngsters have borne burdens which I myself would find very difficult to bear. Our *obligation* in such circumstances is to find alternatives for the problems our patients face. I don't consider death an acceptable alternative. With our technology and creativity, we are merely at the beginning of what we can do educationally and in the field of leisure activities for such youngsters. And who knows what happiness is for another person? What about the rewards and satisfactions in life to those who work with and succeed in the rehabilitation of these "other-than-perfect" children? Stronger character, compassion, deeper understanding of another's burdens, creativity, and deeper family bonds — all can and do result from the so-called social "burden" of raising a child with a congenital defect — repaired but less than perfect.

I have frequently said, facetiously, that nothing makes a woman out of a girl quicker than a colostomy in her child. But it is true.

When from the materialistic point of view a life seems to be without meaning, it can from the spiritual point of view be extremely useful. Such a life might, for example, provide a source of courage in the manner in which the stress caused by disease and its treatment is accepted. There is also no doubt that the value placed upon the patient by his associates as one who is respected and honored and

loved is a source of inspiration to all who see it and a spiritual blessing to many.

"American opinion is rapidly moving toward the position where parents who have an abnormal child may be considered irresponsible." This is the observation of Dr. James Sorenson, Associate Professor of Socio-Medical Sciences at Boston University, who spoke at a symposium, "Prenatal Diagnosis and Its Impact on Society."[2]

Now, if I take a strong stand against a statement like Dr. Sorenson's, I am told that I am trying to legislate my morality for other people. I think, on the contrary, those who agree with Dr. Sorenson's statement are trying to legislate the morality of our society. Parents who might give remarkable love and devotion to an abnormal child are put in the position of feeling they must conform to Dr. Sorenson's morality, or lack of it, for the good of *society* rather than for the good of their own child.

In the book, *Ideals of Life*, Millard Everett writes:

> "No child [should] be admitted into the society of the living who would be certain to suffer any social handicap — for example, any physical or mental defect that would prevent marriage or would make others tolerate his company only from the sense of mercy."[3]

If dehumanization is one of the ideals of life, then when we reach the utopia planned by Mr. Everett, life will be ideal indeed. His reference to marriage I cannot help but consider because I am convinced that the backbone of our remarkable nursing profession and that much of our pediatric care and pediatric social service is to be found in the many unmarried women who devote themselves selflessly to the care of patients. I cannot believe that all of these fine women *chose* not to be married merely to take care of patients. It would follow than that there might have been some "social handicap," to use the words of Millard Everett, that might have prevented marriage. If the social handicap existed then, the social handicap must exist today. How long will it be before the Millard Everetts of our society decide that those with this social handicap, whatever it might be, be eliminated also?

Lord Cohen of Burkenhead, speaking of the possibility of euthanasia for children in Great Britain who were mentally defective or epileptic, said:

> "No doctor could subscribe to this view . . . who has seen the love and devotion which bring out all that is the best in men when lavished on such a child."[4]

J. Engelbert Dunphy, in the annual oration before the Massachusetts Medical Society in 1976, had this to say:

> "We cannot destroy life. We cannot regard the hydrocephalic child as a non-person and accept the responsibility for disposing of it like a sick animal. If there are those in society who think this step would be good, let them work for a totalitarian form of government where beginning with the infirm and incompetent and ending with the intellectually dissident, non-persons are disposed of day and night by those in power."

Dunphy goes on to say:

> "History shows clearly the frighteningly short steps from 'the living will' to 'death control' to 'thought control' and finally to the systematic elimination of all but those selected for slavery or to make up the master race. We physicians must take care that support of an innocent but quite unnecessary 'living will' does not pave the way for us to be the executioners while the decisions for death are made by a panel of 'objective experts' or by big brother himself. The year of 1984 is not far away!"[5]

Dr. Dunphy was speaking of adults dying of terminal cancer, yet his thinking can be extrapolated to the "imperfect" child with frightening consequences.

In the Forshall lecture given by Robert B. Zachary on July 9, 1976, in Sheffield, England, he said:

> "I accept that the advice given by other doctors may well be different from that which I myself give, and although I would strongly support their right to have a different view, they should be expected to state the fundamental principles on which their criteria are based."

Zachary went on to state:

> "I believe that our patients, no matter how young or small they are, should receive the same consideration and expert help that would be considered normal in an adult. Just because he is small, just because he cannot speak for himself, this is no excuse to regarding him as expendable, anymore than we would do so on account of race or creed or color or poverty. Nor do I think we ought to be swayed by an argument that the parents have less to lose because he is small and newborn, and has not yet established a close relationship with them or indeed because the infant himself does not know what he is losing, by missing out on life."

Mr. Zachary concluded his lecture:

> "There are some ways in which modern society cares greatly about those who are less well off; the poor, the sick and the handicapped, but it seems to me that newborn babies are often given less than justice. Our primary concern must be the well-being of the patient — the neonate — as far as it is in our power to achieve it. In his battle at the beginning of life, it could well be that his main defense will be in the hands of pediatric and neonatal surgeons."

Has not Mr. Zachary enunciated the whole *raison d'etre* of the specialty of pediatric surgery?

On the occasion of the 100th anniversary of the Children's Hospital in Sheffield in July of 1976, Mr. Peter Rickham of Zurich presented a paper entitled "The Swing of the Pendulum." Although he concerned himself largely with the problems of meningomyelocele (a birth defect where the spinal cord is exposed, leading to neurological *sequellae,* some correctable and some not), an ethical problem of greater proportion in the British Isles than here, he did talk to some degree on medical ethics in reference to the neonate. In discussing his own interviews with theologians of diverse religious convictions, he had this to say:

> "They all doubt the validity of the basis of the present argument for selection of only the least handicapped patients for survival. The hope that selection will reduce to a minimum the overall suffering of these patients and their families is a well meant but somewhat naive wish. How many normal newborn infants will live happily ever after, especially in our present time? It may be argued that by not selecting, we artificially increase the number of people with an unhappy future, but can we be sure of this in any given case? After all we as doctors deal with single, individual patients and not with statistical possibilities. It has also been pointed out to me (said Rickham) that even a child with a grave physical and mental handicap can experience emotions such as happiness, fright, gratitude and love and that it may be therefore, in fact, a rewarding task to look after him. It has been further argued that, strictly speaking, selection implies a limitation of resources, because with an optimum of resources and care a great deal can be done for these children and their families. In underdeveloped countries these resources do not exist, but in developed countries, where such enormous sums are spent by governments on purposes which are of very doubtful benefit to humanity at large, the distribution of resources is a debatable subject. Finally it can be argued that if selection is practiced, it may not be necessarily the fittest on whom the greatest effort should be expended."

Duff and Campbell in their paper on moral and ethical dilemmas in the special care nursery make the statement that "survivors of these (neonatal intensive care) units may be healthy and their parents grateful but some infants continue to suffer from such conditions as chronic cardiopulmonary disease, short bowel syndrome, or various manifestations of brain damage; others are severely handicapped by a myriad of congenital malformations that in previous times would have resulted in early death."[6]

First of all, it is not necessarily true that the myriad of congenital malformations of previous times would now result in early death. Many patients who have lesions that appear to be lethal can have

those lesions corrected and although they may not be pristine in their final form they are functional human beings, loved and loving and productive. If indeed we decide that a child with a chronic cardiopulmonary disease or a short bowel syndrome or various manifestations of brain damage should be permitted to die by lack of feeding, what is to prevent the next step which takes the adult with chronic cardiopulmonary disease who may be much more of a burden to his family than that child is, or the individual who may not have a short bowel syndrome but who has ulcerative colitis and in addition to his physical manifestations has many psychiatric problems as well or the individual who has brain damage — do we kill all people with neurological deficit after an automotive accident?

Very, very few parents of their own volition come to a physician and say, "My baby has a life not worthy to be lived." Any physician in the tremendously emotional circumstances surrounding the birth of a baby with any kind of a defect can, by innuendo, let alone advice, prepare that family to make the decision that that physician wants them to make. I do not consider this to be "informed consent."

Campbell and Duff say this:

> "Often, too, the parents' and siblings' rights to relief from seemingly pointless, crushing burdens were important considerations."

Here again Duff and Campbell have enunciated a new right and that is that parents and siblings are not to have burdens. Even Duff and Campbell use the word "seemingly" in reference to "pointless" and I am sure that "crushing" as applied to the burden may not be nearly as crushing as when applied to the eventual guilt of the parents in days to come.

As partial justification for their point of view, Duff and Campbell say that although some (parents) have exhibited doubts that the choices were correct, all appear to be as effective in their lives as they were before this experience. Some claim that their profoundly moving experience has provided a deeper meaning in life and from this they believe they have become more effective people.

If these same parents were seeking deeper meaning in life and if Duff and Campbell were indeed interested in providing deeper meaning in life for the parents of their deformed patients, why not let the family find that deeper meaning of life by providing the love and the attention necessary to take care of an infant that has been given to them? I suspect that the deeper meaning would be deeper still and that their effectiveness would be still more effective and that

they would be examples of courage and of determination to others less courageous.

Duff and Campbell talk about "meaningful humanhood," a phrase which they extract from Fletcher, and of "wrongful life," a phrase which they take from Engelhart. As soon as we let anyone, even physicians, make decisions about your humanhood and mine, about your rightfulness or wrongfulness of life and mine, then we have opened the door to decisions being made about our worth which may be entirely different in the eyes of a Duff and a Campbell or their followers than it would be in yours and mine.

In their discussion, Duff and Campbell say that parents are able to understand the implications of such things as chronic dyspnea, oxygen dependence, incontinence, paralysis, contractures, sexual handicaps, and mental retardation. Because a newborn child has the possibility of any of these problems in later life, does this give us the right to terminate his life now? If it does, then I suspect that there are people in this room who have chronic dyspnea, who may have oxygen dependency at night, who might be incontinent, who may have a contracture, who may have a sexual handicap and I trust that none of you are mentally retarded, but let's carry it to its logical conclusion. If we are going to kill the newborn with these potentials, why not you who already have them?

Finally Duff and Campbell say, "It seems appropriate that the profession be held accountable for presenting fully all management options and their expected consequences." I wonder how commonly physicians who opt for starving a baby to death are willing to be held accountable for the eventual consequences in that family which may not be apparent for years or decades to come.

I think the essential message in the Duff and Campbell paper is missed by many. These authors first brought to attention the concept of death as one of the options in pediatric patient care. But it is not always understood that the death they presented as an option was not the death of infants who could not possibly survive but rather the death of infants who could live if treated, but whose lives would not be "normal." It is not the lesion, but the physician's *decision*, that is the lethal factor. In view of the fact that the socio-economic status of the family, and the stability of the marriage, are mitigating circumstances in deciding on treatment or non-treatment, it is clear that there has been introduced a discrimination just as deplorable as those of race, creed, or color, of which we are constantly reminded. I wonder how many of us would be here today if someone had the option of not feeding us as newborns?

Arthur Dyck, who has the intriguing title of Professor of Population Ethics at the Harvard School of Public Health, is also a member of the faculty at the Divinity School at Harvard. The connotation of being a Professor of Population Ethics these days, even with a seminary appointment, would lead one to expect that such a man would be ready and willing to eliminate all life that was not "meaningful" — a word I detest. Yet, Professor Dyck believes much more in the *equality* of life than he does in the *quality* of life; he believes that we should and must minister to the maimed, the incompetent, and the dying. To put it in his words:

> "The moral question for us it not whether the suffering and the dying are persons but whether *we* are the kind of persons who will care for them without doubting their worth."[7]

We in the medical profession have traditionally responded in our treatment of patients as a reflection of our society's human concern for those who are ill or helpless. Indeed we have often acted as advocates for those who had no one else to stand up for them. Thus we have always responded, in days gone by, with love and compassion toward the helpless child. It may well be that our technical skills have increased too rapidly and indeed have produced dilemmas that we did not face a decade ago. But this does not give us any new expertise in deciding who shall live and who shall die, especially when so many non-medical factors must be taken into account in making the decision.

It is really not up to the medical profession to attempt to alleviate all of the injustice of the world that we might see in our practice in the form of suffering and despair. We can always make the effort to alleviate the pain of the individual patient and to provide the maximum support for the individual family. If we cannot cure, we can care, and I don't mean ever to use the words "care" and "kill" as being synonymous.

Leo Alexander, a Boston psychiatrist, was at one time (1946-47) consultant to the Secretary of War on duty with the office of chief counsel for war crimes in Nuremberg. In a remarkable paper (which appeared in the *New England Journal of Medicine,* July 4, 1949), "Medical Science under Dictatorship," he outlined the problem.[8] Let me just mention the highlights of Dr. Alexander's presentation. The guiding philosophic principle of recent dictatorships, including that of the Nazis, was Hegelian in that what was considered "rational utility" and corresponding doctrine and planning had replaced moral, ethical and religious values. Medical science in Nazi Ger-

many collaborated with this Hegelian trend particularly in the following enterprises: the mass extermination of the chronically sick in the interest of saving "useless" expenses to the community as a whole; the mass extermination of those considered socially disturbing or racially and ideologically unwanted; the individual, inconspicuous extermination of those considered disloyal to the ruling group, and the ruthless use of "human experimental material" in medical military research. Remember, physicians took part in this planning.

Adults were propagandized; one outstanding example being a motion picture called "I Accuse," which dealt with euthanasia. This film depicted the life history of a woman suffering from multiple sclerosis and eventually showed her husband, a doctor, killing her to the accompaniment of soft piano music played by a sympathetic colleague in an adjacent room. The ideology was implanted even in high school children when their mathematics texts included problems stated in distorted terms of the cost of caring for and rehabilitating the chronically sick and crippled. For example, one problem asked how many new housing units could be built and how many marriage-allowance loans could be given newlyweds for the amount of money it cost the state to care for "the crippled, the criminal, and the insane." This was all before Hitler. And it was all in the hands of the medical profession.

The first direct order for euthanasia came from Hitler in 1939. All state institutions were required to report on patients who had been ill for five years or more or who were unable to work. The decision regarding which patients should be killed was made entirely on the basis of name, race, marital status, nationality, next of kin, regularly visited by whom, and a statement of financial responsibility. The experts who made the decisions were chiefly professors of psychiatry in the key universities in Germany. They never saw the patients. There was a specific organization for the killing of children which was known by the euphemistic name of "Realms Committee for Scientific Approach to Severe Illness Due to Heredity and Constitution." Transportation of the patients to the killing centers was carried out by the "Charitable Transport Company for the Sick." "The Charitable Foundation for Institutional Care" was in charge of collecting the cost of the killings from the relatives without, however, informing them what the charges were for.

Semantics can be a preparation for accepting a horror. When abortion can be called "retrospective fertility control," think of all the euphemisms for infanticide!

Although Leo Alexander said this in 1949, it applies today:

> "The case therefore that I should like to make is that American medicine must realize where it stands in its fundamental premises. There can be no doubt that in a subtle way the Hegelian premise of 'what is useful is right' has infected society including the medical portion of society. Physicians must return to the older premises, which were the emotional foundation and driving force of an amazingly successful quest to increase powers of healing and which are bound to carry them still farther if they are not held down to earth by the pernicious attitudes of an overdone practical realism."

I think those of you who graduated from medical school within ten to fifteen years of my time probably came out of that experience with the idea that you had been trained to save lives and alleviate suffering. The suffering you were to alleviate was the suffering of your patient and the life you were to save was the life of your patient. This has now become distorted in the semantics of the euthanasia movement in the following way:

> You are to save lives; that is part of your profession. If the life you are trying to save, however, is producing suffering on the part of the family, then, they say, you are to alleviate that suffering by disposing of your patient. So in a strange way you can still say you are saving lives and alleviating suffering — but the practice of infanticide for the well-being of the family is a far cry from the traditional role of the pediatrician and more lately of the pediatric surgeon.

There are many times when I have operated upon a newborn youngster who subsequently dies, that I am inwardly relieved and express honestly to the family that the tragic turn of events in reference to life was indeed a blessing in disguise. However, being able to look on such an occasion in retrospect as a blessing does not, I believe, entitle me to distribute showers of blessings to families by eliminating the problems that they might have to face in raising a child who is less than perfect.

We are rapidly moving from the state of mind where destruction of life is advocated for children who are considered to be socially useless or have non-meaningful lives to a place where we are willing to destroy a child because he is socially disturbing. What we need is alternatives, either in the form of education or palliative measures for the individual as well as for society. We here should be old enough to know that history does teach lessons. Destructiveness eventually is turned on the destroyer and self-destruction is the result. If you do not believe me, look at Nazi Germany. My concern is that the next time around the destruction will be greater before the ultimate self-destruction brings an end to the holocaust.

The power to destroy our civilization and indeed our race is not necessarily good or bad in itself. The difficulty is to be certain that we have the moral character to use this power appropriately. Man's reaction to this kind of power can be either pride, man's greatest problem, or humility, one of man's most commendable virtures. Power accepted in humility is a source of strength for man's moral prerogatives.

We are an enthusiastic and an aggressive people and one of our tendencies is to make decisions on the basis of expediency — to take shortcuts to solutions, if you will. We must be very careful not to throw the baby out with the bathwater and I can't think of any situation where the use of that aphorism is more apropos because we are concerned with babies and we are indeed throwing many babies out in what seems at first glance to be a commendable goal to make life easy for parents and to remove burdens from society.

I have not really chosen a title for these remarks although several have come to mind. The first is "The Camel's Nose is in the Tent," from the Middle Eastern proverb that when the camel's nose is in the tent, it is not long before he is in bed with you, and refers to the thin edge of the wedge in reference to euthanasia. The second that occurred to me, because I see the progression from abortion to infanticide, to euthanasia, to the problems that developed in Nazi Germany, and being aware of the appeal of alliteration in titles, is "Dominoes to Dachau." But having just visited Auschwitz in the company of some of my Polish confreres and having read extensively from the Germans' own reports about what went on there, I view what we are experiencing now as a dynamic situation which can accelerate month by month until the progress of our downhill momentum cannot be stopped. Therefore, I guess I favor the title: "The Subtle, Slippery Slide to Auschwitz."

It is difficult to be a participant in history and understand what is going on with the same depth of perception that one would have if he were able to look back upon the present as an historian. The euthanasia movement — and I use that in the broadest possible sense — is with us today with greater strength and persuasion than ever has been the case before in the history of what we call modern civilization.

Do not dismiss contemptuously my concern in reference to the wedge principle — that when the camel gets his nose in the tent he *will* soon be in bed with you. Historians and jurists are well aware of what I am saying.

The first step is followed by the second step. You can say that

if the first step is moral then whatever follows must be moral. The important thing, however, is this: whether you diagnose the first step as being one worth taking or as being one that is precarious rests entirely on what the second step is *likely* to be.

My concerns center around several aspects of this issue. First of all, I have to say that I am a proponent of the sanctity of life, of all life, born or unborn. I hate the term death with dignity because there is no dignity in death. I have many times withheld extraordinary measures from the care of my patients who were terminal regardless of their age and have felt that I was doing the moral and the ethical as well as the just thing. I have never, on the other hand, taken a deliberate action to kill a patient whether this deliberate action was the administration of a poison or the withholding of something as ordinary as feeding that would keep him alive.

I am concerned about legislation that would take the problems of life and death out of the hands of the medical profession, and out of the realm of trust between the doctor and his patient or the patient's family, and put them into the legal realm.

Perhaps more than the law, I fear the attitude of our profession in sanctioning infanticide and in moving inexorably down the road from abortion to infanticide, to the destruction of a child who is socially embarrassing, to you-name-it.

I am concerned that there is no outcry. I can well understand that there are people who are led to starve children to death because they think that they are doing something right for society or are following a principle of Hegel that is utilitarian for society. But I cannot understand why the other people, and I know that there are many, don't cry out. I am concerned about this because when the first 273,000 German aged, infirm, and retarded were killed in gas chambers there was no outcry from that medical profession either, and it was not far from there to Auschwitz.

I am concerned because at the moment we talk chiefly about morals and about ethics but what is going to happen when we add economics? It might be hard enough for me to survive if I am a social burden but if I am a social burden *and* an economic burden, no matter how precious life might be to me, I don't have a chance.

Let it never be said by an historian in the latter days of this century that after the Supreme Court decided on abortion in 1973, infanticide began to be practiced without an outcry from the medical profession.

Let it not be said by that historian that perhaps the entering wedge was the decision on the part of pediatricians that there were

some burdens too great to be borne by families and that a far better solution to the burden was infanticide of a child who was either unwanted by those parents or who would produce social problems and emotional distress in the family and in society.

Let it not be said that the entering wedge was the infanticide of a portion of the neonatal population of our teaching hospitals' intensive care units.

Let it not be said that pediatric surgeons of this country, who have perhaps the greatest experience and the greatest understanding of what can be done with a deformed life, not just in the correction of mechanical problems but in the rehabilitation of a family, stood by while these things happened and said nothing.

Let it not be said by that historian that in the third quarter of the 20th Century physicians were so concerned with perfect children that the moral fiber of our profession and of our country was irreparably damaged because we had forgotten how to face adversity.

Let it not be said that the extermination programs for various categories of our citizens could never have come about if the physicians of this country had stood for the moral integrity that recognizes the worth of every human life.

## NOTES

1. C.E. Koop, "Of Law, of Life, and the Days Ahead," Wheaton College Graduation Address, June 1973.

2. *Newsletter* of American Association of Pro-Life Obstetricians and Gynecologists, ed. Dr. Matthew Bulfin, Ft. Lauderdale, Florida, August, 1976.

3. Quoted by Leah Curtin in her address "On Dehumanization" on behalf of the National Center for Nursing Ethics, Cincinnati, Ohio, in July 1976 at Boston University.

4. Quoted from P.P. Rickham's discourse "The Swing of the Pendulum," on occasion of the Centennial Celebration of the Childrens Hospital in Sheffield, England, July, 1976.

5. J.E. Dunphy, "On Caring for the Patient with Cancer," *New England Journal of Medicine,* August 5, 1976. 295:313.

6. R.S. Duff and A.G. Campbell, "Moral and Ethical Dilemmas in the Special-Care Nursery," *New England Journal of Medicine,* October 25, 1973, 289:890.

7. A.J. Dyck, "The Value of Life: Two Contending Policies," *Harvard Magazine,* January 1970, pp. 30-36.

8. L. Alexander, "Medical Science Under Dictatorship," *New England Journal of Medicine,* July 4, 1949, 241:39-47.

# Infanticide as an "In" Thing

*M. J. Sobran*

OFTEN OUR reading of old literature seems to tell us less about the personal vision of the author than about the shared vision of his age. When we read Swift or Pope or Boswell we are in great measure "reading" eighteenth-century England, to which their writings are addressed, and whose values and attitudes and beliefs they assume as givens, even when they try to correct or modify them. The historical context is built into the text, and the individual is not entirely distinguishable from his intended audience.

The art of persuasion, or rhetoric, is built on consensus: the speaker or writer tries to move from what he holds in common with his audience to a justification, and a further sharing of what he personally holds to be important. He says, in effect: *our* beliefs imply *my* belief. People who advocate busing for racial integration, for instance, typically try to prove that our society's belief in human dignity requires us to take an admittedly extraordinary measure in order to accommodate and express that dignity. The rhetorician always assumes the prevalent assumptions of those he addresses, whether he agrees with them or not; so that any argument we may examine is likely to be laden with implicit revelations about the society in which it is uttered.

A lot may be gathered about our society from Dr. Koop's address. At the most superficial level, we may note that it is something of a novelty for Western civilization: a protest against infanticide. What Dr. Koop calls "the sanctity of life" (and he obviously didn't invent the phrase) has, until very recently, been a cornerstone of our culture. A few years ago such a protest would have been like a protest against cannibalism — a supererogation so gross as to mark the protester as some kind of eccentric. When, in 1962, Mrs. Sherri Finkbine caused a national controversy by announcing her intention to abort the probably deformed baby she was carrying, a priest wrote to *Time* Magazine: "Why not wait until the child is born, and then, if it is deformed, kill it? That would be more consequential." At the time, that remark was a Swiftian *reductio ad absurdum*. Now its very

**M. J. Sobran Jr.** is a contributing editor to this review. This article begins as a commentary on Dr. C. Everett Koop's preceding article, and then, in the Sobran style, takes off from there.

logic is socially plausible. Dr. Koop quotes members of his profession to prove it.

Let us note, moreover, that Dr. Koop does not *announce* that infanticide occurs, or *accuse* his profession of performing and indulging it; he simply *alludes* to it, as a well-known fact from which to launch his discussion: "You all know that infanticide is being practiced in this country . . ." Nor does he so much as end the sentence with that scandalous fact; he simply moves right on: ". . . and I guess the thing that saddens me most about that is . . ."

Nor is there a tone of outrage in his protest. Despite his personal horror, he speaks with the polite deference of one who realizes that he speaks from outside a consensus. In this case it is charitable and probably realistic to surmise that most pediatric surgeons do not practice infanticide or even expressly approve of it. Yet they seem to know that it occurs, and while it may be unfair to blame the majority for a practice they may be unable, in a given case, to prevent a colleague from performing, one thing that Dr. Koop's citations prove pretty clearly is that they now tolerate its advocacy in respectable professional forums. They accept its discussion in rational terms. They are inclined to regard it not as an atrocity, but as an option. Just as important as the fact that it does occur is the fact that, among those who have the means of performing it and are in a position to decide *whether* to perform it, *it is no longer taboo.*

Think of what is implied in merely speaking of it as a decision. If a man tells us that he has decided not to shoot his mother, we are less likely to applaud his decision than to marvel that he had to decide. The novelty in such a case is that a conventionally prohibited act is suddenly regarded as within the proper domain of choice. The very idea of a taboo — or, if that word suggests the superstition of naked tribesmen, of "sanctity" — is that it implies a limitation on freedom, an object of habitual and compulsory respect. It means something about which tradition has already made the decision for us.

It is true that technology tends to be the enemy of the sacred in its brute extension of our power. Sometimes we abruptly become conscious of our power to choose because we come by the means of doing things formerly difficult or impossible to perform. The availability of new abortion techniques, thought to be safe and almost painless for the mother, presents us with the temptation to overlook the interests of the child within her — or even to deny that it is a child at all. We may resort to a whole new conceptual scheme, defining that child abstractly in terms of its physiological relation to

the mother, semantically excluding it from ordinary human and humane considerations by calling it a "fetus" and its death "termination."

With infanticide it is another matter. Infanticide has always been feasible, requiring no delicate surgical extrusion. No radically new techniques have come along to make it a temptation. What has changed is the moral climate.

Dr. Koop makes a telling point when he remarks on the subtle change in the meaning of the phrase "alleviating suffering." It originally and naturally meant the suffering of the patient, he notes; now it is being used to mean relieving the suffering of those charged with the patient's care. Soon no doubt it will come to mean relieving the suffering of doctors.

But a more serious change, and one more relevant to the problem of infanticide, is a change in the meaning of "freedom"! The word has acquired a long history and a wide range of meanings; but for our purposes two general meanings are of interest.

One is rather simple, even earthy. Being a freeman used to be a matter of not having a master, of not being a slave or serf or bondman or even perhaps an indentured servant. It was a concrete legal status, and implied nothing more than possessing a definite, though limited, area of personal sovereignty. It carried with it a range of options in the management of one's own life: no one else could decide for the free man who he would marry, where he could work or live, and so forth. (There were exceptions, of course: sometimes parents arranged marriages, for instance, but their children's general freedom vis-a-vis the rest of society remained.) The right to decide such matters, for oneself, the by no means universal status of liberty, was recognized as a precious possession, devoutly to be wished by all. At the same time it was never thought of as anything more than one among many of life's blessings, never as an unconditional good transcending all others.

It is not easy to say when the shift to a new concept of liberty occurred, but the Eighteenth Century seems a plausible date to which to assign its genesis. To the French demand for abstract *"liberté,"* the old-fashioned Edmund Burke replied that we do not congratulate the escaped felon or lunatic on the recovery of *his* liberty. No, said Burke, liberty is undoubtedly a good, considered in itself; but at the same time it must also be considered in relation to immediate "circumstances," in the light of what are nowadays called "competing claims." The essence of the modern and mystical notion of liberty is that it tends to deny (or simply refuses to acknowledge)

any competing claims at all, and to reject the legitimacy of any circumstance adduced as limiting freedom.

In particulars we find that this freedom, though hard to define, is very nearly total, and feels itself affronted by almost any suggestion that it be held responsible. This is evident in the heavy rhetorical burden that is put on unspecified but highly charismatic words like "autonomy" and "self-determination" and "liberation," and in the astounding proliferation of alleged "rights" not only to do things but to have them done for one. This is implicit in such notions as "freedom from want." It is explicit in such notions as that a woman not only has the right to get an abortion, but has the right to get it at the nearest nonsectarian hospital.

In such examples it becomes clear that the newer notion of freedom, which amounts (as far as I can see) to the simple removal of all impediments to desire, is at least highly problematical. If I have a right not to want, does it not follow that you have a duty to provide for me? If you have a right to an abortion at my hospital, does it not follow that I have no right to refuse? Whose "right" ought to have precedence when conflicts of this kind arise?

These questions, unfortunately, have not received the kind of scrupulously articulated answers they deserve. In practice they have been resolved in favor of the "consumer" interest, as we may call it. Burke asked what use there was in discussing a man's abstract right to food and medicine; the real question, he said, was how best to produce these goods, and he added that he deemed it wiser to consult the farmer and the physician than the professor of metaphysics. He did not foresee the conscription of the farmer and the physician, or of the nondenominational hospital.

In abortion, of course, the embarrassing "circumstance" for those who assert a simple "right" to abort has been the child. As I have noted, this problem has been circumvented semantically. Not only has the unborn child been assigned a dehumanized identity; some abortion advocates have taken the bolder line that abortion is in the interests of the child whose life is taken. At first the argument was that abortion should be permitted in cases of rape and incest, the progeny of which unions were presumed doomed to an existence of such sheer misery that it was merciful to all concerned to permit them to be aborted. That rationale, now that abortion practically on demand is available, has been dropped. Few if any of those who took the rape-and-incest position have demanded that abortion be outlawed *except* in cases of rape and incest. Most of them, perhaps the overwhelming majority, have moved on to the argument that

every "unwanted child" should be made a candidate for the abortionist's tools.

It is interesting that this argument should be so successful. For although it is obvious that abortion is often, if not always, agonizing for the child who is scorched with chemicals or dismembered with surgical instruments, it is widely accepted that abortion is not even physically cruel. If memory serves, not one of Dr. Kenneth Edelin's defenders saw fit to admit that he had deliberately killed some form of human life, at least an incipient human person, who gave every indication of not wanting to die. It is one thing to assert that women should have the legal right to abort, and to object on legal grounds to Edelin's prosecution; but such a willful averting of one's eyes from the palpable human consequence of those legal entitlements argues a serious deficiency of ordinary sentiment.

In a world in which people are made of flesh and blood and possess the attribute of bumping into each other from time to time, it seems evident that there must be occasional conflicts of interest between persons. This is a fact to which liberalism has a curious cognitive aversion, sometimes taking the form of a doctrinaire denial that there can finally be "real" conflicts of "genuine" interests. Thus we find intelligent people assuring us, without the necessity of producing evidence, that the United States and the Soviet Union are, in the last analysis, compatible, united by overarching shared needs that must somehow obviate the imperative to be prepared for war. Political scientist Kenneth Minogue has termed this curious mentality "the illusion of ultimate agreement." Only a very few abortion advocates are willing to say directly that the desires of the mother should outweigh any possible interests of her unborn child. Instead they sentimentalize the conflict away, first by semantically denying that a real child is involved (or, alternatively, by taking the agnostic position that, after all, nobody can really know "when life begins"), and backing that argument up with presumption that life would not have been worth living for any child whose mother did not want him or her anyway. Thus permitting women to abort gets characterized as an altruistic policy, a beneficent refusal to intervene in family relations to "impose" a solution. The so-called lessons of Vietnam are transposed to the womb, with social policy governed by the slogans of "self-determination" and "non-intervention." But, as with foreign policy, permissiveness in abortion is a matter of simply refusing to tamper with brute power relations rather than a way of promoting real harmony. You can't govern by refusing to govern, pru-

dent though it sometimes is to admit there is nothing to be gained by interfering.

So far the case for infanticide has made little headway. It seems doubtful that it will: but so it seemed with abortion itself a few years back. As long as the bogus altruism of killing the child for his own good is permitted to go unanswered, we have no right to be complacent.

As usual the real question for us as citizens is a practical one: Who will guard the temple?

# Eupharmicum and the Poor

*David W. Louisell*

AN INTERESTING debate — not without a touch of *déjà vu* — took place in the Senate today on the duty of the National Health Program to provide Eupharmicum to the poor. The Program has now taken over all the functions of the old Medicaid program. The debate, as one Senator put it, represents the return of a "relatively few dinosaurs who, in the name of an obsolete morality, would deny to the poor the help of a beneficient, although admittedly expensive, drug, so freely procurable by the wealthy."

There is evidently no real dispute about the benefits of Eupharmicum. In the words of one of its chief pharmaceutical proponents, "It makes the process of dying not only effortless and painless, but affirmatively pleasurable and happy, indeed, even ecstatic, even for a child." Also, there seems to be no serious dispute about the widespread use of Eupharmicum by those rich who are desirous of following the new trend of disposing of hopelessly deficient offspring who, according to medical prognosis, would be doomed to live meaningless lives. While no state legislature has explicitly approved this trend, or modified its homicide statute to accommodate it, a number of judicial decisions are now cited for the proposition that parents have a constitutional "right of privacy" to dispose of hopeless children, at least up to the age of two years, provided the medical prognosis is for a truly "meaningless life." As the distinguished physician, Alex Soothsayer, recently commented: "It is foolish to quibble over precise parameters of the 'meaningless life' concept. A 'meaningless life' is obviously one that cannot reasonably be expected to be meaningful."

The Senior Senator from New York was particularly eloquent in his defense of the rights of the poor. "How dare a wilful little group impose its religious code on others? How do those with ample funds of their own with which to supplement the Health Program's meager provisions, dare to propose a rider to the Appropriations Act that would bar similar help and comfort to the poor? I have reason to believe that there is one distinguished and wealthy member of the

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Senate who has himself invoked the aid of Eupharmicum with which to terminate his own hopeless child. But that honorable Senator has spoken against federal money for Eupharmicum for the needy. I am reminded of the Biblical warning, 'O, ye hypocrits!'," he concluded, to applause so loud that the Vice President had to call for order.

But probably the high point of the debate came when the Senior Senator from California replied to the argument that, if Eupharmicum were endorsed with federal funds for the hopeless needy young, this would constitute subtle support for its use on the decrepit aged, even those perhaps still reluctant to accept its benefits.

"That is the kind of argument to expect from the dinosaurs," the Senator charged. "There never has been a proposal for the improvement of the lot of the common man that has not been countered with a 'camel's nose under the tent' absurdity. I can assure you I am in a position to put this 'slippery slope' argument to rest forever. The Secretary has assured me that there is not even *a single proposal* to make Eupharmicum available to the aged at federal expense."

A member of the House, asked after the Senate vote whether the House would adhere to its stand against federal funds for Eupharmicum, said the whole affair was a tempest in a teapot. His reaction was especially important because he is the only ordained clergyman in the present House.

"In elementary matters of life and death, you simply cannot deny to the poor what the rich are able to buy. The benefits of Eupharmicum for the dying no longer require detailing. They are self-evident. The very word 'Eupharmicum' denotes a truly happy passing, with the aid of the best in modern chemistry, the choicest in modern technology. I do not hesitate to analogize the benefits of Eupharmicum, from a physiological viewpoint, to the spiritual benefits of the Church's Annointment of the Sick," he concluded.

# APPENDIX A

*[The following is taken directly from a study titled "The Steady State Economy," issued by the U.S. Government Printing Office on December 2, 1976, which is Volume 5 of the whole study on "U.S. Economic Growth from 1976-1986: Prospects, Problems, and Patterns" being prepared for the use of the Joint Economic Committee of the United States Congress (Senator Hubert H. Humphrey, Minnesota, Chairman). In his Letter of Transmittal, Sen. Humphrey tells his colleagues that the series — which will eventually include "over 40 studies" — was "undertaken to provide insight to the Members of Congress and to the public at large" on the subjects of full employment and economic growth, and that his Committee "is indebted [to the authors involved] for their fine contributions which we hope will serve to stimulate interest and discussion . . . and thereby to improvement in public policy formulation." Among these stimulating studies is "The Transition to a Steady-State Economy," by Herman E. Daly, a professor of economics at Louisiana State University. We reprint here (with the permission of the Committee) section* B *of Prof. Daly's article, without alteration of any kind.*—Ed.]

## Transferable Birth Licenses

This idea was first put forward by Kenneth Boulding (1964). Hardly anyone has taken it seriously, as Boulding knew would be the case. Nevertheless it remains the best plan yet offered, if the goal is to attain aggregate stability with a minimum sacrifice of individual freedom and variability. It combines macro stability with micro variability. Since 1964 we have experienced a great increase in public awareness of the population explosion, an energy crisis, and are now experiencing the failures of the great "technical fixes" (Green Revolution, Nuclear Power, and Space). This has led at least one respected demographer to take the plan seriously, and more will probably follow (Heer, 1975).

The plan is simply to issue equally to every person (or perhaps only to every woman, since the female is the limitative factor in reproduction, and since maternity is more demonstrable than paternity) an amount of reproduction licenses that corresponds to replacement fertility. Thus each woman would receive 2.2 licenses. The licenses would be divisible in units of one-tenth, which Boulding playfully called the "deci-child." Possession of ten deci-child units confers the legal right to one birth. The licenses are freely transferable by sale or gift, so those who want more than two children, and can afford to buy the extra licenses, or can acquire them by gift, are free to do so. The original distribution of the licenses is on the basis of strict equality. But exchange is permitted, leading to a reallocation in conformity with differing preferences and abilities to pay. Thus distributive equity is achieved in the original distribution, and allocative efficiency is achieved in the market redistribution.

A slight amendment to the plan might be to grant 1.0 certificates to each individual and have these refer not to births but to "survivals." If

someone dies before he has a child then his certificate becomes a part of his estate and is willed to someone else, e.g., his parents, who either use it to have another child, or sell it to someone else. The advantage of this modification is that it offsets existing class differentials in infant and child mortality. Without the modification a poor family desiring two children could end up with two infant deaths and no certificates. The best plan of course is to eliminate class differences in mortality, but in the meantime this modification may make the plan initially easier to accept. Indeed, even in the absence of class differentials the modification has the advantage of building in a "guarantee."

Let us dispose of two common objections to the plan. First it is argued that it is unjust because the rich have an advantage. Of course the rich always have an advantage, but is their advantage increased or decreased by this plan? Clearly it is decreased. The effect of the plan on income distribution is equalizing because (1) the new marketable asset is distributed equally, (2) as the rich have more children their family per capita incomes are lowered, as the poor have fewer children their family per capita incomes increase. Also from the point of view of the children there is something to be said for increasing the probability that they will be born richer than poorer. Whatever injustice there is in the plan stems from the existence of rich and poor, not from Boulding's plan which actually reduces the degree of injustice. Furthermore, income and wealth distribution are to be controlled by a separate institution, discussed above, so that in the overall system this objection is more fully and directly met.

A more reasonable objection raises the problem of enforcement. What to do with law-breaking parents and their illegal children? What do we do with illegal children today? One possibility is to put the children up for adoption and encourage adoption by paying the adopting parents the market value, plus subsidy if need be, for their license, thus retiring a license from circulation to compensate for the child born without a license. Like any other law breakers the offending parents are subject to punishment. The punishment need not be drastic — e.g., a years labor in a public child care center remunerated at the minimum income. Of course if everyone breaks a law no law can be enforced. The plan presupposes the acceptance by a large majority of the public of the morality and necessity of the law. It also presupposes widespread knowledge of contraceptive practices, and perhaps legalized abortion as well. But these presuppositions would apply to any institution of population control, except the most coercive.

Choice may be influenced in two ways: by acting on or "rigging" the objective conditions of choice (prices and incomes in a broad sense), or by manipulating the subjective conditions of choice (preferences). Boulding's plan imposes straight-forward objective constraints and does not presumptuously attempt to manipulate peoples' preferences. Preference changes due to individual example and moral conversion are in no way ruled out. If preferences should change so that, on the average, the popu-

lation desired replacement fertility, the price of a certificate would approach zero and the objective constraint would automatically vanish. The current decline in the birth rate has perhaps already led to such a state. Perhaps this would be a good time to institute the plan, so that it would already be in place and functioning should preferences change toward more children in the future. The moral basis of the plan is that everyone is treated equally, yet there is no insistence upon conformity of preferences, the latter being the great drawback of "voluntary" plans which rely on official moral suasion, Madison Avenue techniques, and even Skinnerian behavior control. Some people, God bless them, will never be persuaded, and their individual nonconformity wrecks the moral basis (equal treatment) of "voluntary" programs.

Should it become necessary to have negative population growth (as I believe it will) the marketable license plan has a great advantage over those plans that put the limit on a flat child per family basis. This latter limit could only be changed by an integral number, and to go from two children to one child per family in order to reduce population is quite a drastic change. With marketable licenses, issued in "deci-child" units or one-tenth of a certificate, it would be possible gradually to reduce population growth by lowering the issue to 1.9 certificates per woman, to 1.8, etc., the remaining 0.1 to 0.2 certificates being acquired by trade. Alternatively the government could purchase certificates in the open market and retire them.

There is an understandable reluctance to couple money and reproduction — somehow it seems to profane life. Yet life is physically coupled to increasingly scarce resources, and resources are coupled to money. If population growth and economic growth continue, then even free resources, such as breathable air, will either become coupled to money and subject to price, or allocated by a harsher and less efficient means. Once we accept the fact that the price system is the most efficient mechanism for rationing the right to scarce life-sustaining and life-enhancing resources, then perhaps rather than "money profaning life" we will find that "life sanctifies money." We will then take the distribution of money and its wise use as serious matters.

## APPENDIX B

*[The following are the full texts of the two Human Life Constitutional Amendments introduced by Senator Jake Garn of Utah in the 95th Congress on January 24, 1977. Now called Senate Joint Resolutions #14 and #15, they are identical in wording to those introduced by Senator James L. Buckley in the 94th Congress (then numbered S.J.R.'s #10 and #11) early in 1975. Senator Garn's co-sponsors are listed with each amendment.]*

### Senate Joint Resolution #14

*(Co-sponsors: Mr. Bartlett, Mr. Curtis, Mr. Danforth, Mr. Eastland, Mr. Hatch, Mr. Hatfield, Mr. Helms, Mr. Lugar, Mr. McClure, Mr. Proxmire, Mr. Young, and Mr. Zorinsky.)*

"Article —

"SECTION 1. With respect to the right to life, the word 'person,' as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.

"SECTION 2. This article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

"SECTION 3. Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdiction."

### Senate Joint Resolution #15

*(Co-sponsors: Mr. Bartlett, Mr. Curtis, Mr. Danforth, Mr. Eastland, Mr. Hatch, Mr. Hatfield, Mr. Helms, Mr. Huddleston, Mr. Lugar, Mr. McClure, Mr. Proxmire, Mr. Young, and Mr. Zorinsky.)*

"Article —

"SECTION 1. With respect to the right to life, the word 'person,' as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, 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.

"SECTION 2. No unborn person shall be deprived of life by any person: *Provided, however,* That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

"SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions."

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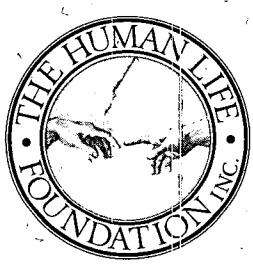
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