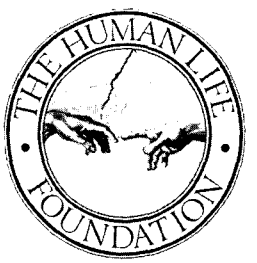
the HUMAN LIFE REVIEW



SPRING 1980

Featured in this issue:

Ellen Wilson ..... Looking-Glass Logic

Senator Jake Garn
& Lincoln Oliphant ..... Abortion and the American Family

Prof. Basile Uddo on..... Perverting the Power of the Purse

Robert A. Destro on ....."The Least Dangerous Branch"

Prof. Robert M. Byrn on .... Manipulating Life

Also in this issue:

Commentary on the United States Supreme Court by:
Raoul Berger • Robert Bork • William F. Buckley Jr. • Bruce Ennis

Published by:

The Human Life Foundation, Inc.
New York, N.Y.

Vol. VI, No. 2 $3.00 a copy

. . . FROM THE PUBLISHER

This is the 22nd issue of *The Human Life Review*. In some ways it may be the most unusual to date. While we deal at length with abortion, and other of our "life issues," we also include a good deal of legal material *not* directly related to such issues, except that a recent decision in an abortion-related case caused the controversey. Specifically, we reprint in Appendix C the text of the brief *Amicus Curiae* submitted to the United States Supreme Court be 238 Members of the current Congress. For space reasons we have *not* included the "front matter": the description of Appellant and Appellees, table of contents, authorities, etc., that normally appear in a printed brief. Should any reader wish to see this additional material we will be glad to supply copies on request.

As is our custom, we supply the addresses of the other material reprinted in this issue:

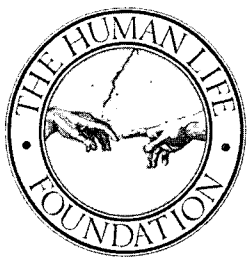
- The article by Professor Raoul Berger was first published in *National Review* magazine (150 East 35th St., New York, N.Y. 10016; $21 per year).
- The transcript of *Firing Line* was originally published by the Southern Educational Communications Association (928 Woodrow St. P.O. Box 5966, Columbia, So. Carolina 29250; $1 per copy).

Readers are reminded that we now have available bound volumes (fully indexed) of the first five years (1975-1979) of this review; see the inside back cover for full information.

We ask that anyone submitting a manuscript please enclose a postage paid return envelope along with it. Finally, while we make every attempt to answer all correspondence, read all manuscripts, etc., as soon as possible, we have no full-time paid staff so please bear with us.

EDWARD A. CAPANO
Publisher

THE HUMAN LIFE REVIEW



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Published by THE HUMAN LIFE FOUNDATION, INC. Editorial Office, Room 540, 150 East 35th St., New York, N.Y. 10016. The editors will consider all manuscripts submitted, but assume no responsibility for unsolicited material. All editorial and subscription inquiries (and all requests for reprints and permission) should be sent directly to the editorial office. Subscription price: $12 per year; single copy, $3. Bulk prices on request.

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INTRODUCTION

CAN ANYONE BE NEUTRAL about abortion? Like slavery before it, the issue polarizes on contact. Those in favor generally argue that it is a "private choice," to be made by the "potential mother" (as Mr. Justice White recently described her) alone; they see nothing incongruous in arguing that *all* potential mothers must have this right, while telling those opposed to mind their own business. Those opposed think it *is* their business to defend the lives of others. Attempts at neutrality (for whatever reason) usually run aground, for the same reason that Stephen Douglas's "Popular Sovereignty" foundered: if abortion is merely a matter of choice, then it cannot be very bad, or for that matter very good. At best, such neutrality (like some social Switzerland) avoids the battle which rages on.

But there can be no *moral* Switzerland. The abortion issue permeates, like dye in water, changing the whole tone of things. Thus we find many choosing who should *avoid* choice. For instance, doctors (a woman may by law "choose freely," but not for free): one might think that, as the primary financial beneficiaries of abortion, they would cling to professional neutrality; in fact — although many individuals are in the forefront of the anti-abortion movement — the Medical Establishment (the associations, prestigious journals, and such) has come out strongly for abortion (we welcome any examples to the contrary). In like manner lawyers, who — given the rampant litigiousness spawned by the issue — must surely be the second-most gainers. Yet the Legal Establishment too seems aggressively pro-abortion. An extreme example: on May 1 of this year, New York's prestigious Federal Bar Council presented (at its annual Law Day Dinner) its highest honor, the Learned Hand Medal for Excellence in Federal Jurisprudence, to Judge John Dooling.

Now however well-known he may be within his profession, Judge Dooling is famous for only one thing: his extreme pro-abortion rulings. It is impossible to separate this perception from a public award: the "excel-

lence" that his Peers commend must be, then, his position on abortion (unless, of course, lawyers — trained to decide the most public issues — are in fact hermetically isolated from public perceptions).

As it happens, this issue is, in its way, dedicated to Judge Dooling. Or, at the least, inspired by his actions. For the judge has vividly demonstrated a central point: the abortion issue cannot be contained. It has no boundaries of its own. Concerning as it does the nature and meaning of human life itself, it is a legitimate (and unabortable) intruder into all other questions. In Dooling's case, for instance, the attempt to find a final solution *in re* abortion has most recently led him to single-handedly challenge the powers of the Congress of the United States (surely *that* is not the "excellence" his Peers honor?). Thus abortion, which seems to have nothing whatever to do with the Congress's "Power of the Purse," has become the match setting of a constitutional explosion.

We deal with various aspects of the whole tangled matter in this issue. We make no claim to definitive analysis: the vexed questions involved are by no means settled as yet (some may never be). We have tried to provide a series of tangential views focusing on a central theme. Admittedly, it is a most complex theme. Perhaps the best summation we've seen was written by Mr. Ronald Butt, in the London *Times* (February 7 last):

> For nearly 2,000 years of Christian civilization, taking the life of an unborn child was regarded as a vile and heinous moral offense which degraded humanity. When an abortion was done to save the life of the mother or to prevent a woman from the consequences of rape, those responsible, including the doctors, acted in consciousness that a grave moral decision was involved. Abortions to avoid illegitimate births, or otherwise for convenience, were performed with a secrecy that was as much the mark of the shame attaching to the deed as a consequence of its illegality.

There you have it: the attempt to baptize by sudden *fiat* what has always been legally and morally damned has shaken the very foundations of our civilization. Little wonder, then, that the abortion dilemma can already be traced, like the pattern in a Persian rug, beneath the nation's legal, political, and social fabric. Or that a dozen people of different views can comment, as they do here, on the same questions in such varying ways. We begin with Miss Ellen Wilson — much to our own surprise. Given the nature of the other articles that follow, we expected to introduce her usual finely-honed essay as a refreshing tonic, *after* the weighty discussions. We underestimated her uncanny ability to write about *anything*: not even the opaqueness of the law can defy her penetrating lucidity. She turned in a summation of the whole case, which should be read before the arguments. Consider: " . . . the attempt to call a fetus an 'aggressor' in the womb of all places is ridiculous. What else are wombs *for*, to put the question in Aristotelian terms? Where else would a human fetus be? And where else would that particular human fetus be, formed from the fusion of invited

sperm and home-bred ovum? This is not, after all, a vagrant fetus seeking shelter wherever it may be found." Or: "The abortionist's right of privacy has been let loose to devour whatever other rights impede it." And: "We do not refrain from killing people simply because we love them, just as we do not (if we are sane and law-abiding) kill people simply because we dislike them. We refrain from killing people because they are people." (Get thee to a law school, Ellen — they need you on the Court.)

The *meaning* thus fresh and clear, we trust you will relish the arguments. The distinguished Senator from Utah, Jake Garn, and his colleague Lincoln Oliphant, detail a) a particular case (showing abortion's "reach" into the vitals of family life) plus b) a short refresher-course on just how we've arrived at such an incredible *impasse*. Seldom have we been able to offer such an in-depth treatment of a complex series of interlocking cases that is so eminently *readable*. You will note that Judge Dooling appears here and there in the Garn/Oliphant picture. So as not to keep the reader in further suspense, we switch abruptly to Professor Basile Uddo's detailed description of the judge's latest venture into federal judicial excellence. (At this point the reader may well want to consult Appendix C, which is the text of the brief *Amicus Curiae*, authored in part by Professor Uddo, and which is the scripture for Uddo's exegesis.)

Mr. Robert Destro picks up the argument from another angle, but the theme remains the same: more on Dooling, the family, the abortion cases, the Constitution, the Federalist Papers — new things from old, and *vice versa*. Then a step back (or aside?), and Professor Robert Byrn weighs in with a tightly-argued essay on the semantics of it all.

Appendix A brings you supporting testimony from an Expert Witness, Professor Raoul Berger — same theme(s), another viewpoint (perhaps we should note that the Eminent Professor *agrees* with the Court's intent *re* abortion; he simply can't find the legal, as distinguished from legislative, *rationale*). Appendix B is the transcript of a TV program on the Court, etc.; we have reprinted other such transcripts before, because a) we think it is a shame that the best (all too little) of what is said on television disappears with the pictures, and b) some of it, including what we reprint here, is highly readable. And, again here, germaine.

Finally, Appendix C, the brief signed in the first instance (more have joined in since) by 238 Members of Congress, which, so far as we can tell (or the Library of Congress can tell us) is an historic first. For the record, it uses the word *abortion* but once. Yet we think it will stand as proof positive of what, in this issue, we have argued: if abortion is a *good thing* (as the Court and Judge Dooling order us to believe), then we — our society, and its institutions — are at war, *a outrance*, with ourselves.

J. P. McFADDEN
Editor

Looking-Glass Logic

Ellen Wilson

> *"Contrariwise," continued Tweedledee, "if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic."*
>
> *"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."*
>
> THROUGH THE LOOKING GLASS

TO THE UNTUTORED LAYMAN trying to make sense of the way courts handle abortion, arguments seem to go by contraries. Like the world through Alice's looking glass, the Supreme Court seems a place where words mean their opposites, where parallel lines of argument may intersect, where elementary logic may be overturned, inverted, and then filed away for future jurisprudential use. In this review lawyers trained to travel the maze-worlds of majority and minority opinions conduct guided tours of recent Supreme Court decisions, and pending decisions. My aim is less ambitious. Returning to the looking-glass image, I am going to bypass the scientific explanations of reflection and refraction, with their diagrams of light waves bouncing off mirrors, and simply describe what anyone may see.

A. The Abortion Decisions

Abortion, so one is told, is an issue of privacy. NARAL said so, way back before 1973 when it was the National Association for the Repeal of Abortion Laws. Feminist pro-abortionists said so, ACLU (American Civil Liberties Union) people said so, and finally, in 1973, the Supreme Court said so, when it warned governments and citizens alike to honor a woman's reproductive privacy. For the Supreme Court discovered, not only that abortion is about privacy, but that privacy (except during census years) is a constitutional right. Inquirers were directed to the Bill of Rights and the 14th Amendment, where the relevant penumbrae could be viewed.

The first question which comes to mind, then, is what the Court *means* by privacy? Do the justices distinguish their notion of privacy from that of the 13-year-old who keeps a Secret Diary? Do they

Ellen Wilson, our contributing editor, remains our youngest contributor (she was 21 when her first article appeared in our Fall '77 issue).

mean only that American women have a constitutional right to keep secrets? It would appear not, for private citizens and government officials have long since recognized large limitations on this kind of privacy.

For example, a citizen's right to keep a secret about criminal guilt is recognized and protected if the guilt is his own (see the Fifth Amendment), but denied if the guilt is another's (subpoenas, perjury laws, etc.). A minor's right to privacy is severely abridged, particularly in his earlier stages of development, and so is the right of one spouse to be "private" from the other. Then there is the yearly abridgement of our right of privacy by the IRS. The elusive constitutional penumbra of privacy has never deterred them.

We may agree, then, that this sort of "privacy" is scarcely inviolate, whether in theory or in practice. We may further decide that "privacy" is not the most appropriate word for what NARAL and Justice Blackmun are talking about. (The substance of the pregnant woman's complaint can't really be that her unborn is eavesdropping on her.) Let us rename this right, or more scrupulously define it as the right to form and carry out independent decisions ("personal autonomy" is the way one ACLU lawyer describes it) affecting ourselves and our future. Even so, the shackles remain. For even the less imaginative of the disciples of John Stuart Mill recognize that the right to do as one pleases is qualified: others resent the liberties we take with their liberties. Thus is built up a great cloud of mutually-eclipsing penumbrae for the political scientists to contend with, and the delineation of their limits is neither as easy nor as clear-cut as the "right to privacy" may suggest.

Other people have pointed out the difficulty of first identifying and then expediting everyone's right to privacy, but the courts and their beneficiaries seem almost obstinately to overlook the problem, seem even to think they have solved it. But this right to privacy, this right to do as one pleases when it is allowable to do as one pleases, carries us no further toward a resolution of the abortion question. It merely restates the problem, but in a submerged, incomplete, and ultimately deceptive manner. The question both parties asked the court was "Does the woman's right to do as she pleases with her pregnancy collide with other rights of greater or equal significance?" But that question presupposed the answering of another: Is the human fetus human? The Supreme Court has stigmatized this as a "moral" or "religious" question outside the purview of the court; the

major newspapers and magazines have labelled it a divisive question which threatens the First Amendment, party politics, and pluralism; Sens. Kennedy and Moynihan and other tender consciences in the Congress have labelled it a "personal" question which resists the formulation of a "public" opinion. What none of them say is that it is the proper question to ask. If two people are arguing about the square root of two, their opposing viewpoints will not be reconciled by learning that the Normans invaded England in 1066. The Supreme Court has been trying to change the subject — to privacy, minor's rights, etc. — for seven years now, and it has been reaping its just reward in a long series of litigants trying to bring it back to the point. One could understand a muddled majority of nine men deciding that the human fetus is not human. One cannot understand a majority of nine jurists offhandedly ruling that the question is irrelevant. For if the unborn is human, then of course his right to life will collide with the mother's right to jettison him; if he is "just a mass of tissue" (aren't we all, in one sense), then by all means, respect her privacy.

Even some pro-abortionists were embarrassed by the poor argumentation of the Abortion Decisions. Charged with the defense of a judicial decision so mediocre, they scrambled for more sophisticated arguments for their newly-won right. Embroidering on the privacy principle, one school has declared the (unwanted) fetus an aggressor within the womb, and abortion the moral and legal equivalent of self-defense. But the line of this argument retraces that of the original one. Both, after all, are merely sophisticated versions of "I didn't ask to get pregnant," which, as argument, ranks with the eight-year-old's "I didn't ask to be born." Here, as in the Supreme Court's abortion decisions, the key question is slurred over: is the unborn human? If so, a pregnant woman's physical (and sometimes psychological) distress is being weighed against a human life. If not, then what is all the fuss about?

But there is an additional point to be made about this privacy of the womb, and that is, that except in rare cases of rape and incest, it hasn't been violated. The woman, whether or not she "planned" the pregnancy, *did* grant admission to the sperm which fertilized her ovum. Further, the attempt to call a fetus an "aggressor" in the womb of all places is ridiculous. What else are wombs *for*, to put the question in Aristotelian terms? Where else would a human fetus be? And where else would that particular human fetus be, formed from

the fusion of invited sperm and home-bred ovum? This is not, after all, a vagrant fetus seeking shelter wherever it may be found.

All in all, it would seem the fetus has quite as much claim to privacy as the mother: he should be allowed to develop naturally in the womb. But now we are "presupposing" the fetus' humanity, and that is an act of intellectual temerity from which the Supreme Court still shrinks.

B. The Minor's Right to Privacy

A court incompetent to deal with the central issue of the abortion cases — upon which all our constitutional rights depend, since they are predicated upon our humanity — would hardly seem qualified to intrude upon mother-daughter relations. Yet that has been the second arena in which the abortion right has been contested. I mentioned earlier that the "right to privacy" brought to mind adolescent diaries kept under lock and key. State and Federal courts in cases such as *Bellotti* have, with obvious discomfort but a manful sense of duty, defended the right of a teenage girl to keep certain diary entries, at least, private from their mothers. For they appear to have awarded the minor a bonus right: not only may she decide for herself whether to have an abortion, but recent decisions have allowed her to decide privately, without parental consultation and without disclosing her decision or even her pregnant condition.

Others (see for instance the Garn/Oliphant article in this issue) have explored the legal precedents upset by such decisions, the inconsistency of requiring parental consent for almost any kind of medical treatment (or legal contract) *except* abortion, the foreboding implications of these decisions for other aspects of family law, etc. What should be evident, however, is that privacy is not the preeminent issue at stake. Or at least, if both parties have concentrated on the issue of privacy, it is because courts have sacrificed the family's privacy for the sake of a peculiarly-interpreted right of privacy for the teenager (as though statute books were to record penalties for disregarding the "Do Not Disturb"-sign on her bedroom door).

But consider the merely semantic difficulties into which the Supreme Court's looking-glass logic has embroiled it. The Court has seemingly committed itself to the notion that the minor's right of privacy can only be guaranteed by ensuring that she consult with a public servant — a judge. That it is a more private act to consult

with a total stranger than with the people who gave you life and nourished it, is not intuitively obvious. That doctor, judge, and pregnant minor should combine in a conspiracy of silence, with the sole intent of deceiving those directly responsible for the minor's welfare, is not self-evidently wise, or just, or even commonsensical. Worst of all, perhaps, is the Court's justification for this conversion of a dubious right into a part of the judicial process: for their argument that "confidentiality" may be in the minor's best interest amounts to little more than a thinly-veiled acknowledgement that Mom and Dad would be very sore if they knew what was going on.

The justices would claim that abortion is an extremely serious and difficult matter (agreed); that there are parents who do not make the right decisions for their children (no quarrel there); and therefore, that an impartial authorizing body must be available to provide the minor with a more promising second opinion. To which the layman would reply that judges are as fallible as parents, and in addition, their training peculiarly *ill*-equips them for juggling just those individual circumstances which, presumably, justify judicial intrusion in the first place. Parents know their children better than strangers do; with few exceptions, they love them better, and in addition they are motivated by a heavier, more constant, and more immediate sense of responsibility than the stranger can share. And as C. S. Lewis reminds us, there is this crucial distinction between love and the sympathetic liking a stranger or acquaintance may feel:

> Kindness, merely as such, cares not whether its object becomes good or bad, provided only that it escapes suffering. . . . It is for people whom we care nothing about that we demand happiness on any terms: with our friends, our lovers, our children, we are exacting, and would rather see them suffer much than be happy in contemptible and estranging modes.

To a benevolent judge or a kindly doctor (to take the best case), confronted with a child whose future will be agonizingly complicated by a pregnancy, abortion will often appear the simple and most beneficial course. But the minor's parents, conscious of continuing responsibility and instructed by love, will more likely consider the kind of person their daughter should be, the kinds of truths she must own up to in order to reach maturity. They, who first introduced her to small responsibilities, will not wish her to shirk greater ones, though they will wish that they could spare her the pain and sacrifices these may entail.

But the looking-glass court has decided that ignorance may judge

more justly than knowledge, and a child's welfare be better directed by institutionalized benevolence than by love. This is the second kind of ignorance which the Supreme Court is embracing as judicial principle, for the court counsellors of the minor's abortion decision have already bound themselves to ignorance of what it is the pregnant girl bears in her body.

Federal Funding and the Right of Privacy

Surprise (and even disbelief) over the Supreme Court's interpretation of the right to privacy has been dulled by seven years' familiarity. Outrage over the co-opted rights of families has been diluted by a series of decisions involving spouses and children which have stretched across the intervening years. Looking-glass logic, like Euclidean geometry, comes more easily to the mind with practice. But now Judge Dooling's decision that Medicaid funds must be appropriated for abortions marks a further expansion of the judicially-defined right of privacy. The argument now runs that the right of privacy casts its own pale penumbra, requiring not only legalization of abortion-on-demand, but conscription of public funds as well. It is perhaps stretching patience to run through the arguments at length. I do so quickly to reacquaint the reader with the other rights, large and small, which the abortion right is toppling.

It would appear self-evident that if abortion is merely a matter of private choice (if it is one of that class of activities that may legally be engaged in or avoided), there is no obvious obligation for the taxpayer to subsidize someone else's fancy for an abortion. We do not ordinarily subsidize fancies or their fulfillment, whether they are trivial (baseball, Rhine wines) or more important (marriages, sex-change operations). We leave private tastes to private purses.

But pro-abortionists open up a "second front" argument for public funding, which supports the first not so much by force of logic (in reality, the two coexist uneasily) as by drawing our attention away from the details of either. They argue that the abortion decision is so important, so grave in its effect, so likely to alter the mother's lifestyle and redirect her future, that *only* the prospective mother can weigh all the arguments, debate the options, and decide upon the correct course. On these terms, whatever decision the pregnant woman makes is the correct one *for her*, and if the woman is too poor to (in the bureaucratic phrase) "implement that decision," then the public must step in.

This second front argument is distracting, but unconvincing, either by itself or in tandem with the first one. To begin with, if the good or evil of an abortion is preponderantly subjective (as it must be if only the pregnant woman is qualified to judge the matter), then we on the outside cannot tell whether she made the "right"decision. Misinformation, distraught emotions, outside pressure, an uninstructed or misinformed conscience — all could have skewed her reasoning or warped her judgment. We have no reason to assume she made the right decision (used her materials properly, so to speak), and cannot, on that basis, bear a responsibility to realize it for her.

Further, we lack precedents for such funding in other areas. Most important personal decisions are not publicly funded. The choice of a career, for instance, is very important, particularly if it will require long and costly preparation. Yet the nation recognizes no duty to fulfill every adolescent's dream of becoming a doctor or lawyer or dancer or electrician. Even if we were sure that every person could correctly estimate his abilities, as well as his long-term appetite for the job, we wouldn't force taxpayers to send a kid to Harvard or Juilliard.

There is another difficulty with the personalist or subjectivist argument. The idea of an abortion decision so personal that it cannot be evaluated or entered into by the outsider, can backfire against the pro-abortionist. The argument from American Pluralism can cut both ways. Judge Dooling claims that the Hyde Amendment violates the First Amendment freedom of religion rights of those indigent women who have a "religious" belief in the innocence of abortion. (Such case histories exist. There is the female Methodist minister who referred to her own abortion as one of the holiest experiences of her life.) Judge Dooling's opponents have replied quite reasonably on behalf of those taxpayers who feel at least as strongly that abortion is wrong. What are the qualifications of pro-abortionists for judging the circumstances of their opponents' decision *not* to finance abortions? They are, though they won't admit it, hoist on their own subjectivist petard. Anti-abortionists contend that abortion is wrong in and of itself; pro-abortionists claim that it is a matter for individual consciences to decide, implying if not openly stating that it may at least sometimes be a *good.* On what grounds can they object when another's Inner Light directs him to withhold funding for abortions? What has happened to the right of privacy of the anti-abortionist, or is he presumed to have forfeited it

by forfeiting his right to have an abortion? The abortionist's right of privacy has been let loose to devour whatever other rights impede it.

Finally, for those who wish to take the pragmatic view, there is the chilling argument that poor people's abortions may be in the national interest — may, to seek out constitutional fiat, "promote the general welfare." Aborting Welfare babies would reduce the crop of Welfare children and teenagers, and eventually Welfare adults and old people. On this theory one could justify the putting to sleep of all adults approaching eligibility for Social Security payments. And this is where it goes wrong: it is *not* a theory; its adherents do not consider the assumptions which underlie it. For the utilitarian position leads us back to our old unanswered question. After all, it is not the *fetus* who will consume thousands of dollars worth of government food, clothing, and education. It is the "post-fetus." When pro-abortionists calculate costs of live births versus abortions in order to demonstrate the expediency of abortion, they are really calculating relative expenses of life versus death. It is not the first nine months, but the succeeding four score and ten years, that make the difference. Death, it turns out, is a great economy move. But have we considered whether it is proper — whether it is *safe* — to encourage a nation to be so grudging of life?

Which leads us back to our opening question. We know the expensive fourscore and ten years is human life. Is the relatively economical first nine months also human life? If so, it can't be sacrificed to balance budgets, public or private. The slavery analogy which John Noonan has employed so well in this review and elsewhere again provides an appropriate parallel. During the Lincoln-Douglas debates, Stephen Douglas explained his "personally opposed, *but* . . ." position on the expansion of slavery into the territories. He wanted the issue to be resolved by popular sovereignty, and claimed not to care "whether it is voted up or down." Lincoln's reply exposed Douglas' underlying assumption:

> Any man can say that who does not see anything wrong in slavery, but no man can logically say it who does see a wrong in it; because no man can logically say he don't care whether a wrong is voted up or down . . . . He contends that whatever community wants slaves has a right to have them. So they have if it is not a wrong. But if it is a wrong, he cannot say people have a right to do a wrong.

And so the abortion issue stands today. If abortion *doesn't* determine the fate of a tiny human life, then let it be voted up or down. If

it does, then it belongs to that class of questions which does not take kindly to compromise. If it is relatively unimportant whether abortion is legal or illegal, publicly or privately funded, then the government can have no strong national interest in it, individuals may freely differ without dire repercussions, and the courts are not justified in searching the Constitution for a bill of attainder against Henry Hyde. If abortion is a matter of life and death, then it must be decided correctly. And that can't be done by a court which has declared its incompetency to deal with the question.

D. Logic along a Single Track

I have been talking about judicial looking-glass logic, confusions of public and private, preoccupations with side-issues while central questions are neglected, and the inability of the Supreme Court to see that political philosophy and epistemology are the underpinnings of the Constitution they interpret. The thing to hold in mind is that looking-glass logic is not the suspension of logic: it is logic developed along one line at the expense of all the rest (this was Chesterton's definition of madness). It is logic lost to proportion, divorced from first principles, or tied too closely to just one. More frightening than present contradictions or inconsistencies in Supreme Court thinking is the Supreme Court's devotion to drawing out one or two pet principles at the expense of the rest, and neglecting the substance of cases for the more ornamental and politically-consequential accidents of cases. Minds so constituted may easily go from bad to worse: they may go from anything to anything, as long as they are allowed to follow the same logical track. They are like trolley-car conductors who imagine that the city limits mold themselves to the line of the track, so that nothing important escapes their view. So far, I have been describing the bad thinking that has been and is being done; now I turn to the worse that may be, or might be, or would be, if the courts and their advocates had the courage of their logical convictions. But like science-fiction societies which remain unrealized because they are *too* logical, the full force of the court's logic may not be inflicted on us.

The argument for privacy, when used to advocate the abortion right, presupposes that only wanted children should be born. An unwanted child is a double offense: marring the happiness of his mother, and bringing upon himself, unwittingly, his own unhappiness. But is any child fully wanted in his final form — or most of his

intermediate stages of development? Is any child ever "expected," in the non-gynecological sense? And aren't we kept in suspense about the degrees of unacceptability, not only in the months before a child is born, but for a number of years thereafter? Of course, the most common case is one in which the parent "wants" the child more at one age than at another. A placid one-year-old may become a day-dreaming, inattentive eight-year-old; a loving youngster may become a stand-offish adolescent; the child's tastes may grow either towards or away from his parents'. In the fullest sense of the word, parents can't know what they're in for.

Consider the plight of Dr. William Shockley, Nobel laureate and recent contributor to a eugenicist's sperm bank, who has confessed in an interview that his middle child possesses mediocre talents and intelligence. How greatly may that child have been wanted while his shortcomings were concealed within the womb, and how progressively unwanted (in one sense) he may have become thereafter. G. K. Chesterton once exposed the delusions of the eugenicist in this way:

> Mr. Blatchford, with colossal simplicity, explained to millions of clerks and workingmen that the mother is like a bottle of blue beads and the father like a bottle of yellow beads; and so the child is like a bottle of mixed blue beads and yellow. . . It is not like blue beads mixed with yellow beads; it is like blue mixed with yellow; the result of which is *green*, a totally novel and unique experience, a new emotion . . . . Every birth is as lonely as a miracle. Every child is as uninvited as a monstrosity.

But if the Supreme Court is right, and abortion a question of taste or preference, with no unpleasant ethical considerations to complicate the issue, then why shouldn't parents have the option of delayed abortion? Why not extend the privilege and allow mothers to do away with four-year-olds who fuss or 10-year-olds who flunk math?

One obvious answer to this is that such children, if not always "wanted," are almost always loved. They are loved even when they are not always liked, or understood. But this is not a complete or fully-satisfying answer. It begins at the middle rather than at the beginning. It is situational, concerned with effects rather than principles. It is logical, and as far as it goes, it is "true" — it deals with real, possible situations. The problem is, it does not cover all situations. In fact, it bears the hallmark of Supreme Court thinking in its preference for incidentals at the expense of fundamentals. We do not refrain from killing people simply because we love them, just as we do not (if we are sane and law-abiding) kill people simply because

we dislike them. We refrain from killing people because they are people.

Some truths are so fundamental that it requires conscious effort to bring them to mind. And most of the time there is no need to. But because an object is large is no excuse for ignoring its existence, and even fundamental truths may be endangered at times. If we do not ask whether the unborn are human, we will never know whether they share with us a common humanity. If we do not, upon occasion, question the foundation of our rights, we will have no answer for those who wish to chip away at them in the name of social goals or subsidiary rights. If we do not know why we have the right to privacy, we will not know how to draw the limits of that right. "We refrain from killing people because they are people": would the current Supreme Court know what to make of that explanation?

Abortion and the American Family: A Note on a Court Long Overdue

Senator Jake Garn and Lincoln C. Oliphant

GEORGE F. WILL, one of the world's smartest people and best writers, reports that in the 1940s and 1950s the Chicago Cubs baseball team had a shortstop named Roy Smalley. "From Roy Smalley," says Will, "I learned the truth about the word 'overdue'." Will says that as a boy he would sit with his ear pressed against the radio and hear the announcer say, "The Cubs have the bases loaded. If Smalley gets on, the tying run will be on deck. And Smalley is overdue for a hit."

Will continues:

> It was the most consoling word in the language, "overdue." It meant: in the long run, everything is going to be all right. No one is really a .222 hitter. We are all good hitters, all winners. It is just that some of us are, well, "overdue" for a hit, or whatever.
>
> Unfortunately, my father is a righthanded logician who knows more than it is nice to know about the theory of probability. With a lot of help from Smalley, he convinced me that Smalley was not "overdue." Stan Musial batting .249 was overdue for a hot streak. Smalley batting .249 was doing his best.
>
> Smalley retired after eleven seasons with a lifetime average of .227. He was still overdue.[1]

Those of us who watch the Supreme Court with the same enthusiasm (and sense of impending doom) with which Mr. Will watches the Cubs are waiting to see what the Court will do with one of its latest abortion cases. And believe me, the Court is "overdue."

The Court struck out in *Roe* v. *Wade*[2] and *Doe* v. *Bolton*.[3] It struck out again in *Planned Parenthood of Missouri* v. *Danforth*[4] and *Bellotti* v. *Baird*.[5] The Court is coming to bat again in an appeal from the Utah Supreme Court, *H.L.* v. *Matheson*.[6] The Utah case involves the validity of a Utah statute that requires a physician to "Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor. . ."[6]

Many court watchers fear the Court will strike out again. Because

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we share that fear, we have written this article (which is like encouragement from the batting coach as the Court stands in the on-deck circle). Our encouragement is this: even a .227 hitter averages at least one hit for every five times at bat.

The Supreme Court on Abortion and the Family: A Brief Review

The dishonorable history of the Supreme Court's decisions of the past seven years do not need to be detailed again in the pages of *The Human Life Review*. For five years now, the *Review* has been the most articulate and intelligent critic of the Court's role in abortion. A brief history, however, will remind the reader of the current status of abortion and family rights and re-mark the course the Court has taken in arriving at its present position.

On January 22, 1973 the Court handed down *Roe* v. *Wade*[7] and *Doe* v. *Bolton*.[8] In *Wade*, the Court held that "for the stage prior to approximately the end of the first trimester, the abortion *decision* and its *effectuation* must be left to the medical judgment of the pregnant woman's attending physician."[9] After the end of the first trimester, the State may regulate the abortion procedure in ways which are "reasonably related to maternal health."[10] After viability, the State "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[11] In *Bolton*, the Court said that the physician's medical judgment "may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient."[12]

The Court noted at the time that there were statutes which required spousal or parental consent before a woman could obtain an abortion, but the Court declined to decide then and there whether such provisions were Constitutional.[13] Justices White and Rehnquist put us on notice that *Wade* and *Bolton* signaled a shift in family values by pointing out that in the two cases the majority of the Court had found that "the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus. . . ."[14]

As Professor John Hart Ely has pointed out,[15] the Court found in the Constitution a right of abortion "accorded a far more stringent protection . . . than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment."[16] At the

same time, the rights of the unborn child were reduced below those of draft cards, dogs, and post offices.[17] It is no wonder then that the super-protected right of abortion as delineated in *Wade* and *Bolton* led inextricably to the undermining of other rights, particularly family rights.

Planned Parenthood of Missouri v. *Danforth*[18] was the "logical and anticipated corollary"[19] to *Wade* and *Bolton*. Among other things, the plaintiffs in *Danforth* challenged the provisions of a Missouri statute which required consent of a married woman's husband or the parents of a minor.

Section 3 (3) of the Missouri statute required the written consent of the spouse of a woman seeking an abortion during the first twelve weeks of pregnancy unless the abortion was necessary "in order to preserve the life of the mother."[20] The State of Missouri argued that the spousal consent provision was similar to other legitimate laws which restrict the activities of one partner of a marriage; e.g., the State referred to statutes which required both parents to consent to an adoption; which required both parents to consent to an artificial insemination and the legitimacy of children born under such circumstances, and statutes requiring both partners to agree to dispose of an interest in real property. The State also said that it "recognized that the consent of both parties is generally necessary . . . to begin a family, [so] the legislature has determined that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent."[21]

The Court held that Section 3 (3) was unconstitutional because "we cannot hold that the state has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy when the state itself lacks that right."[22] This remarkable statement — that a father has no rights in the abortion area other than those which the state might have *and* which the state deigns to delegate to the father — has extremely serious implications. To the extent the Court follows and extends its holding, to that same extent will the rights of free people — who believe they have inalienable rights independent of the state — be impoverished.

In dissent, Justice White pointed out that the statute was not an attempt to have the husband vindicate the *state's* interest, but an attempt to preserve his own interest. The statute, said Justice White, recognizes that "the husband has an interest of his own in the life of

the fetus which should not be extinguished by the unilateral decision of the wife."[23] Justice White continued:

> It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the *state's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. . . . It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child.[24]

Joseph Sobran has correctly pointed out that the logic of the Court's decision would lead to an end to paternity suits, and perhaps other remedies for mothers and children. Why is this so? Because, says Sobran, "if motherhood is going to be optional, then no woman who chooses it should be able to impose the consequences of her choice on an unwilling man. If a pregnant woman has nine months in which to decide whether to bear a child, during which time she need neither consult nor inform the father (even if he's her husband) and during which time he can't have any say in the matter, it seems grossly unfair to require him to support the child she alone decided to bring into this world.... If women shouldn't be burdened with unwanted children, neither should men. Especially not at the whim of the women."[25] One feminist's response to Sobran's logic was that it was "cruel." Sobran rightly places the blame not on the logic, but on the Court.

A feminist, Juli Loesch, notes that abortion is a great convenience for men. It used to be, before abortion-on-demand, that the father of a child born out of wedlock was expected to be responsible for the child's welfare. Now, Loesch says, "The responsible thing is to put up the cash for an abortion ('No hard feelings, O.K.?') . . . And if the woman, for some reason, ends up having the baby after all, the man may feel perfectly justified in saying, 'Hell, I did my duty. I offered to abort it. Don't expect me to help support it.'"[26]

The *Danforth* Court was not content to nullify only the spousal consent provision of the Missouri statute. It also found unconstitutional Section 3 (4) which required an unmarried woman under the age of 18 years (and within the first twelve weeks of pregnancy) to obtain the written consent of a parent or person *in loco parentis* before obtaining an abortion, unless her life was in danger. As justification for the regulation, the State pointed out that limitations

upon minors are more stringent than upon adults in many areas of the law. The State also showed that girls as young as 10 and 11 had sought abortions, and that permitting such a child to obtain an abortion without the consent of the adult "who has responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors."[27]

The Court was not persuaded. It found that just as with the spousal consent provision, "the State does not have the Constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[28]

Four Justices dissented from the Court's holding regarding Section 3 (4). Justice Stevens wrote in dissent:

> . . . Even if [abortion] is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.
>
> The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well.. . . A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational."[29]

The Court's majority was not deterred by Justice Stevens's eminently reasonable argument, but it did say that although Section 3 (4) was invalid it did not mean to "suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[30] This statement leads us to our final case in this brief history.

In *Bellotti* v. *Baird*[31] the Court considered the Constitutionality of a Massachusetts statute requiring an unmarried pregnant woman under the age of 18 years to obtain the consent of both of her parents before obtaining an abortion. The statute also provided, however, that "If one or both of the [pregnant girl's] parents refuse such consent, consent may be obtained by order of a judge of the Superior Court for good cause shown, after such hearing as he deems necessary."[32] The statute also provided for the consent of

only one parent when the other parent was absent and for the consent of the girl's guardian if both parents were absent.

Writing for the Court, Justice Powell (whose decision was joined by only three other Justices) set out a good review of the Constitutional law for children,[33] the rights of states to limit the freedom of children,[34] and the general deference given to the role of parents in the upbringing of their children.[35] Justice Powell said the Court had "recognized three reasons justifying the conclusion that the Constitutional rights of children cannot be equated with those of adults: The peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing."[36] He also made a point which is too often neglected in consideration of parent-child cases, i.e. strong families are not inconsistent with, and in fact are a precondition for, strong, healthy, and independent individuals. Said Justice Powell: "Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberties; rather the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supported by the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[37]

Notwithstanding Justice Powell's recognition of the limited rights of children and the important role of parents, he found the Massachusetts statute unconstitutional. He arrived at that conclusion because the "abortion decision differs in important ways from other decisions that may be made during minority."[38]

The Court not only found the Massachusetts statute constitutionally impermissible, it also set out guidelines for a statute which would conform to Constitutional requirements. The Court held that

> . . . Under State regulation such as that undertaken by Massachusetts, every minor must have the opportunity — if she so desires — to go directly to a court without first consulting or notifying her parents. If she satisfies the Court that she is mature and well-informed enough to make intelligently the abortion decision on her own, the Court must authorize her to act without parental consultation or consent. If she fails to satisfy the Court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interest. If the Court is persuaded that it is, the Court must authorize the abortion. If, however, the Court is not persuaded by the minor that she is mature or that the abortion would be in her best interest, it may decline to sanction the operation.[39]

So we see that the Supreme Court wants a minor to have some help in making the important abortion decision, but is afraid of letting the parents provide that help. Instead, the parents' role is supplanted by a stranger, i.e., a judge or bureaucrat.[40] And not only will judges be making these decisions instead of parents, but the parent — who the Court recognizes has an interest in the abortion decision[41] — will not even be notified of the judicial hearing. As Professor John T. Noonan, Jr., has said, this is not only an "invasion of parents' rights" but it is also "an invasion of what most people have considered an absolutely essential element of due process of law" since the parent will not be notified of a judicial proceeding in which he or she has a legitimate interest.[42]

When the history of the destruction of parents' rights at the expense of abortion is finally written, the epitaph may be taken from Justice White's dissent in *Bellotti II*. "Until now," the epitaph will read, "I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince the judge that the parents should be denied participation in the decision."[43]

The Utah Case, *H. L.* v. *Matheson*

H. L. was a fifteen-year-old minor living at home, dependent on her parents and in the first trimester of her pregnancy when she brought her complaint. She proceeded in a class action, asserting that Section 76-7-304 (2) of the Utah Code[44] unconstitutionally abridged her right to an abortion. She claimed the statute restricted her right to privacy which includes her right to an abortion, particularly during the first trimester of pregnancy, without regulation or interference by the State. She also asserted that the statute was an overly broad regulation which interfered with her right to consult freely with her physician and to secure an abortion.[45]

The challenged statute reads as follows:

> 76-7-304. To enable the physician to exercise his best medical judgement, he shall:
>
> 1. Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> a. Her physical, emotional and psychological health and safety,
>
> b. Her age,
>
> c. Her familial situation.
>
> 2. Notify, if possible, the parents or guardian of the woman upon whom the

> abortion is to be performed, if she is a minor or the husband of the woman, if she is married.[46]

H. L. specifically challenged the parental notification requirements of subsection (2).

When H. L. consulted her physician and sought an abortion, he refused to provide it without notifying her parents. Under the Utah statute, physicians failing to comply with 76-7-304 (2) are subject to a fine not exceeding $1,000[47] or imprisonment for a term not to exceed one year.[48]

After reviewing the relevant law — including *Wade, Bolton, Danforth*, and *Bellotti II* — the Utah Supreme Court unanimously upheld the constitutionality of the statute. Writing for the Court, Justice Maughan wrote:

> First and foremost, the statute does not *per se* impose any restrictions on the minor as to her decision to terminate her pregnancy. Second, . . . the parent is in a position to provide valuable information concerning the factors which the physician may consider in exercising his best clinical judgement. Third, the State has a special interest in encouraging (but does not require), an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child.[49]

Since the Utah statute serves the significant state interests listed above, and since the statute did not "confer on the parent an absolute and arbitrary veto, which was found impermissible in *Danforth*,"[50] the statute was held constitutional.

The United States Supreme Court has agreed to hear an appeal of the Utah decision.[51]

The Swing-Men: Justices Powell and Stewart

It is apparent from the decisions in *Wade, Bolton, Danforth* and *Bellotti II* that the disposition of the Utah case, *H. L.* v. *Matheson*, will turn on the votes of Justices Powell and Stewart. In *Danforth*, four Justices dissented from the Court's holding that the parental consent portion of the Missouri statute was unconstitutional. Justice Stevens wrote: ". . . the State's interest in the welfare of its young citizens is sufficient, in my judgement, to support the parental-consent requirement."[52] Justice White, speaking for himself and Chief Justice Burger and Justice Rehnquist, wrote that:

> Missouri is entitled to protect the minor unmarried woman from making the [abortion] decision in a way which is not in her own best interest, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children

> from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here.[53]

Therefore, unless these four Justices have had a change of mind, they will likely vote to uphold the Utah statute. The Utah statute is, of course, less restrictive of a minor's "rights" than the Missouri statute since the Utah Statute requires only notification while the statute challenged in *Danforth* required consent.

Justices Powell and Stewart joined the Court's opinion in *Danforth*, but Justice Stewart also wrote a separate concurring opinion which was joined by Justice Powell. Because of the importance of these Justices' votes to the Utah case, the part of Justice Stewart's concurring opinion dealing with parental consent is set out in its entirety:[54]

> With respect to the State law's requirement of parental consent, . . . I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in [*Bellotti*] suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.[55]
>
> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.[56]

The Stewart concurring opinion in *Danforth* seems to have been the basis for the Court's opinion in *Bellotti II*. Regardless of the extent to which the Stewart-Powell concurring opinion set the basis for the subsequent opinion, however, it is true that the plurality opinion of the Court in *Bellotti II* was written by Powell and joined by Stewart. (Burger and Rehnquist were the other half of the four-man plurality.)

Justice Powell's *Bellotti II* opinion creates some doubt that the

Utah statute will be upheld. Note the following examples from the Powell decision:

> We conclude, therefore, that under State regulation such as that undertaken by Massachusetts, every minor must have the opportunity -- if she so desires — to go directly to a Court without first consulting or notifying her parents.[57]
>
> If, all things considered, the Court determines that an abortion is in the minor's best interests, she is entitled to Court authorization without any parental involvement.[58]
>
> Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity. . . . As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation or consent, the general rule with respect to parental consent does not unduly burden the constitutional right.[59]

For the Utah Supreme Court decision to prevail at the United States Supreme Court level, the Justices will have to vote in the following manner: Justices Stevens, White, and Rehnquist, and Chief Justice Burger will have to maintain the positions they took in *Danforth. And,* either Justice Powell or Justice Stewart or both will have to distinguish some of their language in *Bellotti II* from the Utah law. This is posible because the parental consent requirement in Utah occurs in a medical rather than a judicial context and because the Utah statute does not link the notification requirement with a consent (whether parental or judicial) requirement. *Or* (and this is a very, very slight possibility), at least one of the Justices who signed the Stevens concurring opinion in *Bellotti II,* i.e., Justices Brennan, Marshall, and Blackmun, will have to take the position that although requiring any third-party *consent* is constitutionally impermissible, parental *notification* is all right. These three Justices (and Stevens) held that *Danforth* controlled *Bellotti II.* We do not, therefore, have the benefit of their views on parental notification only, since they held that the requirements for third-party consent in the Massachusetts statute were unconstitutional under the principles enunciated in *Danforth.* While it is true that we do not have the definitive views of Brennan, Marshall, and Blackmun on parental notification (as opposed to parental consent), it is unlikely that any of these votes will be cast in support of the Utah statute. Still, we can hope.

The first reason the Supreme Court should uphold the Utah stat-

ute is the traditional, and constitutional, deference given parents in the upbringing of their children and the corresponding reasonable limitations placed upon minors' constitutional rights. The Court is fully aware of the Constitutional law in this area. In fact Justice Powell's plurality opinion in *Bellotti II* has a good summary of the constitutional law of minors and their parents.[60] In brief, the Court has held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"[61] but that "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences"[62] because "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder."[63] Indeed, just two weeks before the Court's decision in *Bellotti II*, the Court turned back a challenge by "children's rights advocates" to Georgia's voluntary commitment procedure for children under the age of eighteen.[64] The challenge was based in large part on the language and supposed implications of *Danforth*. In rejecting the challenge to the Georgia statute, the Court said,

> Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our Constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty to recognize and prepare [their children] for additional obligations." . . .
>
> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the State. . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical treatment. Parents can and must make those judgments.[65]

The Court does not need tutoring in the general rule. It may, it is true, need some advanced study on the family so that it will have the good sense to apply the general rule in the Utah case. For this purpose, the following sources will be helpful.

To Empower People: The Role of Mediating Structures in Public Policy by Peter L. Berger and Richard John Neuhaus.[66] The authors define mediating structures as "those institutions standing between the individual in his private life and the large institutions of public

life."[67] In this book, the authors consider four mediating structures — neighborhood, family, church, and voluntary associations. The following excerpt is from the chapter on family:

> Public concern for the family is not antagonistic to concern for individual rights. On the contrary, individuals need strong families if they are to grow up and remain rooted in a strong sense of identity and values. Weak families produce uprooted individuals, unsure of their direction and therefore searching for some authority. They are ideal recruits for authoritarian movements inimical to democratic society.
>
> * * * * *
>
> . . .We oppose policies that expose the child directly to state intervention, without the mediation of the family. We are skeptical about much current discussion of children's rights — especially when such rights are asserted against the family. Children do have rights, among which is the right to a functionally strong family. When the rhetoric of children's rights means transferring children from the charge of families to the charge of coteries of experts ("We know what is best for the children"), that rhetoric must be suspected of cloaking vested interests — ideological interests, to be sure, but, also and more crudely, interest in jobs, money, and power.
>
> Our preference for the parents over the experts is more than a matter of democratic conviction — and does not ignore the existence of relevant and helpful expertise. It is a bias based upon the simple, but often overlooked, consideration that virtually all parents love their children. Very few experts love, or can love, most of the children in their care. Not only is that emotionally difficult, but expertise generally requires a degree of emotional detachment. In addition, the parent, unlike the expert, has a long-term, open-ended commitment to the individual child. Thus the parent, almost by definition, is way ahead of the expert in sheer knowledge of the child's character, history, and needs. The expert, again by definition, relates to the child within general and abstract schemata. Sometimes the schemata fit, but very often they do not.[68]

Another recommended text is *The Family — America's Hope* published by the Rockford College Institute.[69] This volume contains nine papers presented at a Rockford College seminar which was held in mid-1979. One of those papers was presented by Michael Novak, who gave three answers to the question "Why the family?"

> First, without [the family] there isn't any future. It is as simple as that. There is only one way for the human race to have a future. That is for us to have children.[70]
>
> Second, the family is the only department of health, education and welfare that works. We only need a Department of Health, Education and Welfare when the family doesn't work. And then it is exceedingly expensive for that

> department to do anything about the failures of the family. It is not only very expensive but relatively ineffective.[71] The family is important in so many different ways in the development of each single human individual. In no other way could we do the job half so efficiently, half so cheaply, or with half so much affection, and so much confused and rich and thick emotion.[72]
>
> Now the third answer to "Why the family?" . . . has to do with the sort of moral realism induced in human beings by family life. I would like to argue that there is a learning of moral virtue produced under the conditions of normal family life that cannot be duplicated in any other way.[73]

On the need for the family as a mediating structure between the individual and the State. Again quoting Professor Novak writes:

> We have begun to learn that the individual alone isn't enough. The family often stood behind the strong individual without our noticing it. The family was so omnipresent that we could talk only about the individual, not seeing how much that strong individual owed to a certain kind of family. Strong individuals, normally speaking, are produced by certain kinds of families. Correspondingly, a State facing only naked and lonely individuals will soon devour them all. It may, in any case, devour us all.[74]

Finally, I recommend Bruce C. Hafen's article, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their 'Rights'."[75] Professor Hafen conducts a very fine discussion of parents' and children's rights and concludes by asking if the most basic right of a child is his right "not to be abandoned to his 'rights'."

The articles cited here, and the sources cited within the articles, provide a firm foundation for a philosophy of family life. This philosophy, it seems to me, provides adequate support for upholding the constitutionality of the Utah statute.

The second reason that the Utah statute should be upheld is that the abortion right is not, and cannot be, absolute. In *Wade,* the Court said "The privacy right involved [in abortion] cannot be said to be absolute."[76] Since *Wade* was decided, however, the abortion right has proved to be probably the most protected right under the United States Constitution.[77] Nevertheless, this right or any other right cannot be absolute and in the Utah case the abortion right runs up against an irreducible family right. If the Utah statute is not upheld, I cannot conceive of any family right that could ever be asserted against the abortion right. The provisions of the Utah statute are minimal and irreducible, i.e., there is no more minimal family right that can be asserted against the abortion right. If minors physicians cannot be compelled by the State to inform the

parents of a serious medical procedure to be performed upon their child, then the State will never be able to assert against the abortion right any influence for parents on behalf of their children.

The absolutist view of the abortion right has two serious problems: first, the Court has not said the right is absolute, and second, absolutism has serious philosophical problems. The expression of the philosophical problems has been ably made by Professor Sidney Hook:

> The first difficulty [with the notion of rights being absolute] is that it makes intellectually incoherent the acceptance of certain laws whose justice is acknowledged even by alleged believers in absolute rights. For example, the First Amendment forbids the making of any law "prohibiting the free exercise" of religion. As everyone knows, some religions involve morally objectional practices ranging from polygamy to human sacrifice, all of which are forbidden by law. . . . But as far as I know all absolutists, on the bench or off, approve of these laws.
>
> [The first difficulty, Hook continues, is "formidable" but not "insuperable" if one is willing to go to absurd lengths to defend an absurdity.]
>
> . . . The second elementary difficulty the doctrine of absolute rights, however, *is* insuperable. One of the commonest experiences in life is the conflict of rights. But if rights are absolute how can there be more than one of them? . . . Suppose the right to speak interferes, as it very well might, with the free exercise of someone else's religion — which one must be abridged? Or suppose, . . . that freedom of speech or press conflicts with a man's right to a fair trial?[78]

In the Utah case, we have a conflict of rights. The right of a pregnant minor to have an abortion without State interference is set against the right of the parents to know what their children are doing, and particularly to know when a third party is going to perform a serious medical procedure on their child. As we have said earlier, if the right of parents in this case does not prevail, parents will have no rights over their minor children in the abortion area, for it is impossible for parents — with the concurrence of the State — to assert a less intrusive claim against the abortion right than they have done in the present case.

The Utah statute should be upheld because it is part of a legitimate, reasonable, and responsible body of statutory law enacted by the State of Utah and designed to protect and promote the welfare of children, parents, and the State. Among other things, Utah protects children against abuse[79] and against certain types of contracts;[80] minors (and their parents) are protected against various types of

custodial interference;[81] minors are provided with a juvenile court system because of the recognized differences between juvenile and adult offenses;[82] minors are protected from various forms of sexual exploitation, including participation in pornographic films and exhibitions;[83] and minors are guaranteed various kinds of financial support. [84] A parent can be imprisoned or fined if he or she "knowingly and without just cause fails to provide for the support of the spouse or children [under the age of sixteen years] when either is in needy circumstances."[85] In the State of Utah, "every parent, guardian or other person having control of any minor between six and eighteen years of age [is] required to send such minor to a public or regularly established private school. . . ."[86] Any parent or guardian who "willfully fails to comply" with this requirement is guilty of a misdemeanor.[87] Truant officers may be appointed to enforce the compulsory attendance statutes[88] and the juvenile courts have the duty to take appropriate action.[89] Presumably, appropriate action for either a truant officer, a school official, or a juvenile court official would be to notify a parent or guardian that the child under his or her control is not attending school. Also in Utah, parents and guardians are, with certain exceptions, liable for the retail value of any merchandise (and court costs and reasonable attorneys fees) which their child or ward shoplifts.[90] Parents and guardians are also liable, with certain exceptions, when a minor in their care intentionally, recklessly or willfully, or intentionally and unlawfully destroys, damages, or tampers with the property of another.[91] It can be readily seen that the Utah legislature has erected a statutory structure designed to promote the welfare of its citizens, particularly its minor citizens. As a whole, the Utah statutes place the power of the State against the parent and on behalf of the child to ensure that the child's interests are protected. Can it reasonably be said that the State can be constitutionally prohibited from requiring a physician to notify a parent of a minor's abortion but require a parent to be notified when his or her minor child misses school? What kind of view of family life is encompassed by a constitution which allows a State to hold parents liable for the acts of their children but does not permit the parents simply to be notified of their child's abortion? If advocates of "children's rights" insist that minors must have their abortions without notifying their parents then advocates of "parents' rights" will soon be demanding the other half of the bargain, i.e., that the State cannot restrict their "right of privacy" by burden-

ing them with assorted laws which require them to support and discipline their children.

The Utah statute should be upheld because it is a legitimate and reasonable exercise of state authority over the practice of medicine. Note that Section 76-7-304 of the Utah Code[92] defines, in part, what shall constitute a physician's "best medical judgment."

In *Wade*, the Court said that during approximately the first trimester of pregnancy "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, *in his medical judgment*, the patient's pregnancy should be terminated."[93] During approximately the second trimester of pregnancy the State regulation may include "the qualifications of the person who is to perform the abortion; . . . the licensure of that person; the type of facility in which the procedure is to be performed . . .; the licensing of the facility; and the like."[94] Now the question is, whether the State can, constitutionally, set *any standards whatsoever* regarding what will constitute (during the first trimester) the physician's "medical judgment" and (during the second trimester and thereafter) his "medical judgment," "qualifications," his "licensure," "and the like."

Let us focus on the first trimester situation. The Utah minor was in the first trimester of her pregnancy when she sought her abortion and the Supreme Court has set the most extreme limits on State regulation for first trimester pregnancies. The question is, then, whether States can have any role in defining the physician's "medical judgment." Suppose, for example, that a State enacted a statute requiring a physician to take a pregnant minor's temperature and medical history, and to order a series of blood tests before performing an abortion. Suppose also that a physician brings suit challenging the hypothetical statute as an infringement on his right to practice his profession and upon his patients' right to abortion. We have come a long way down the road to absolute absurdity in abortion cases, but can a State legislature not require a physician to take a patient's temperature and medical history if, in the physician's "medical judgment," such information is unneeded?

Consider another reason for the legitimacy of a statute requiring parental notification. A State legislature has every reason to conclude, and in fact would probably be irresponsible if it did not conclude, that a minor does not know her own medical history well enough to provide a physician a base of knowledge which is ade-

quate for surgery. A little reflection, and a little research, will show that the vast majority of minors do not know what diseases they have had, what drugs or treatments they are allergic to, whether there is a history of family medical problems, and so on. To obtain that information, a physician needs to contact the parent or guardian. To perform a surgical procedure — whether abortion or any other procedure — without that medical history is grossly irresponsible. A State has every right, and indeed it has a duty, to define a physician's "medical judgment" in such a way as to include information based on an adequate medical history.

Still another reason why a parental consent requirement is constitutional is that it helps guarantee that a minor will choose a competent physician. A State legislature can clearly conclude that minors are not capable of selecting competent physicians; for this task, a minor needs the support and advice of a parent. (And adults have a difficult enough time choosing competent physicians.) For the Supreme Court of the United States to deny a State legislature the opportunity to make a reasonable rule to help ensure that minors obtain competent medical care is wholly irresponsible. The accounts of the Chicago abortion mills all too vividly demonstrate that there are plenty of social and medical "experts" willing to prey on pregnant women and girls.

Finally, let us mention some of the implications that will flow from a finding that the Utah statute is unconstitutional. First, if the minor's parents cannot be notified they certainly cannot be required to pay. If they could be required to pay then of course the game would be up as they would know about the abortion which their daughter and her abortion advocates were trying to hide. Since abortionists and their helpers in abortion referral services do not work for free, who will pay? The taxpayers, of course. A constitutional right for a minor to have an abortion without notifying her parents implies a right to have a publicly funded abortion because requiring the parents to pay, when they are able, would negate the abortion freedom of the minor. The Court must not rush to ratify any theory of law which implies a right to public funding. Article I, Section 9, Clause 7[95] must not be so easily brushed aside — notwithstanding Judge Dooling's penchant for doing so.

If the Utah statute is struck down, it must be because a minor has a right to abortion secrecy. That is, no one associated with abortion can be compelled to tell the parents that an abortion will take place

or has taken place. What are the implications of such a right if something goes wrong? Suppose because of the abortion the daughter misses school for a week. Are the parents entitled to know why? Remember that the parents have a legal duty to see that their daughter is in school, but now we are considering a right so broad as to prevent people from telling the parent why the daughter cannot attend school for a week. Suppose the daughter hemorrhages and has to be hospitalized. Can the parents be informed about the hospitalization or about the reason for the hospitalization? If they can be informed, what about this grand right to privacy which the minor has claimed and which the Court may ratify? If the daughter dies during the abortion, may a state, constitutionally, require someone — perhaps even the physician — to tell the parents? The parents will be shocked by the circumstances of their daughter's death, of course, because she had told them she was going to a school picnic (and the state could not require the physician to tell them the truth).

There will be those who will accuse us of an unsupportable *reductio ad absurdum*. The absurdity, however is not ours; nor is the incessant march to greater and greater absurdities. We need only ask the reader to inspect the Supreme Court cases that are likely to follow *Wade, Bolton, Danforth, Bellotti II*, and, I fear, *H.L.* v. *Matheson*.

If the Court strikes down the Utah statute, it will not be a victory for privacy or freedom, it will be another iron beam in the megastructure of the megastate. In *Women's Community Health Center* v. *Cohen*[96] a federal district judge considered a Maine statute which required parental notification. He found the statute unconstitutional, and did so, in part, on the basis of affidavits which were submitted to him by various medical doctors. The doctors averred that parental notification would "in some instances . . . be harmful to both the minor and the family relationship;" they also said that "in some cases parents will pressure the minor, causing great emotional stress and otherwise disrupting the family relationship;" finally, they said that "notifying some parents of a child's pregnancy can create physical and psychological risks to the child."[97] The State replied to these affidavits by pointing out that its laws regarding child abuse and neglect and authorizing the Maine Department of Human Services to take an abused child under protective custody were sufficient protections against a parent's abuse of a child whose pregnancy had become known. In response to this argument of the

State, the federal district judge said, "It is clear, however, that the Department [of Human Services] cannot protect children from parents who coerce a child's abortion decision in ways that are not physically abusive or neglectful."[98] And it is upon this sort of reasoning that we are asked to believe that this abortion right promotes personal privacy and self-determination. It does not do that; what it does is cause federal judges to say that because an agency of the State cannot prevent a parent from influencing a child's decision in ways "that are not physically abusive or neglectful" then the State must find other ways to keep the parents ignorant. It is a corruption of good sense and good law to say that a State cannot require a child to notify her parents of *her* abortion decision because the parents may attempt to influence her decision "in ways that are not physically abusive or neglectful."

Finally, the Court needs to be reminded that the people who do not want parents to know about abortions are the same people who do not want the pregnant woman or girl herself to know (the reality) about abortion. In *Danforth*, the abortion lobby opposed Section 3 (2) of the Missouri statute which required that before a woman in the first twelve weeks of pregnancy could submit to an abortion she must certify in writing her consent to the procedure and further certify "that her consent is informed and freely given and is not the result of coercion."[99] The abortion lobby argued that this requirement for informed consent violated the woman's right to privacy.[100] If the Court will bear in mind the fact that the abortion lobby does not want the woman herself to give an informed consent, then it ought to be extremely skeptical of that same lobby's attempt to keep the parents ignorant.

Let Roy Smalley strike out when the bases are loaded, America's families need a hit from the Supreme Court. And the Court is overdue.

NOTES

1. G. Will, *The Pursuit of Happiness and Other Sobering Thoughts (New York: Harper & Row, 1978).*
2. 410 U.S. 113 (1973).
3. 410 U.S. 179 (1973).
4. 428 U.S. 52 (1976).
5. U.S. , 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979).
6a. Utah , 604 P.2d 907 (1979).
6b. The statute is printed at text, note 46, infra.
7. 410 U.S. 113 (1973).
8. 410 U.S. 179 (1973).
9. 410 U.S. at 164 (emphasis added).
10. *Id.*
11. *Id.* at 165.

12. 410 U.S. at 192.
13. 410 U.S. at 165, n. 67.
14. 410 U.S. at 221 (White, J., dissenting).
15. Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," 82 *Yale L.J.* 920 (1973).
16. *Id.* at 935 (footnote omitted).
17. See, *id.* at 926.
18. 428 U.S. 52 (1976).
19. The phrase is the Court's. *Id.* at 55.
20. See, *id.* at 67-68.
21. *Id.* at 68.
22. *Id.* at 70.
23. *Id.* at 93 (White, J., concurring in part and dissenting in part).
24. *Id.*
25. Sobran, The Washington *Post*, Feb. 21, 1980.
26. Quoted in Meehan, "The Other Right-to-Lifers," *Commonweal*, Jan. 18, 1980, at 15-16.
27. 428 U.S. at 72-73.
28. *Id.* at 74.
29. *Id.* at 103 (Stevens, J., concurring in part and dissenting in part).
30. *Id.* at 75. *Cf. Bellotti* v. *Baird*, 428 U.S. 132 (1976)[*Bellotti I*].
31. U.S. , 61 L.Ed.2d 797, 99 S. Ct. 3035 (1979) [*Bellotti II*].
32. *Bellotti* v. *Baird*, No. 78-329, Supreme Court of the United States, decided July 2, 1979, slip opinion at 2 [*Bellotti II*]. [Hereinafter, all citations for *Bellotti II* will be to the slip opinion].
33. Sections II and II-A, *id.* at 10-12.
34. Section II-B, *id.* at 12-13.
35. Section II-C, *id.* at 14-16.
36. *Id.* at 10-11.
37. *Id.* at 15 (footnote omitted).
38. *Id.* at 18-19.
39. *Id.* at 24.
40. *Id.* at 20, n. 22.
41. See, *id.* at 25.
42. Noonan, "Is the Family Constitutional?" speech published by the American Family Institute (Washington, D.C.). See also, Noonan, *A Private Choice — Abortion in America in the Seventies* (New York: The Free Press, a division of Macmillan, 1979), and especially "Inquiry 10."
43. *Bellotti II, supra* note 32 at 1-2 (White, J., dissenting).
44. Utah Code Ann. § 76-7-304 (2) (1953).
45. See, *H.L.* v. *Matheson*, Utah, 604 P.2d 907, 908 (1979).
46. *Supra*, note 44.
47. Utah Code Ann. §§ 76-7-314 (3) & 76-3-301 (3) (1953).
48. Utah Code Ann. §§ 76-7-313 (3) & 76-3-204 (1) (1953).
49. 604 P.2d at 912.
50. *Id.*
51. *cert. granted*, U.S., 48 U.S.L.W 3554 (Feb. 26, 1980).
52. 428 U.S. at 105 (Stevens, J., concurring and dissenting).
53. 428 U.S. at 95 (White, J., concurring in part and dissenting in part).
54. 428 U.S. at 90-91 (Stewart, J., concurring).
55. For some of the considerations that support the State's interest in encouraging parental consent, see the opinion of Mr. Justice Stevens, ... [Footnote by Justice Stewart.]
56. The mode of operation of one such clinic is revealed by the record in *Bellotti I* at 132, and accurately described by the appellants in that case:

> "The counseling . . . occurs entirely on the day the abortion is to be performed. . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another. . . . The physician takes no part in this counseling process. . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques. . . .
>
> "The abortion itself takes five to seven minutes. . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician, . . .

may be performing abortions on many other adults and minors. . . . On busy days patients are scheduled in separate groups, consisting usually of five patients. . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room. . .." (Citation omitted.) [Footnote by Justice Stewart.]

57. *Bellotti II*, slip opinion at 24.
58. *Id.* at 25.
59. *Id.* at 26.
60. *Supra*, notes 33, 34, and 35.
61. *Bellotti II*, slip opinion at 10, quoting *In re Gault*, 387 U.S. 1, 13 (1967).
62. *Bellotti II*, slip opinion at 12.
63. *Id.* at 15, quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).
64. *Parham* v. *J.L.*, No. 75-1690, Supreme Court of the United States, decided June 20, 1979.
65. *Id.*, slip opinion at 16-17.
66. Berger & Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy (1977).*
67. *Id.* at 2.
68. *Id.* at 20-21.
69. Rockford College Institute, *The Family — America's Hope* (1979). Reprinted in *The Human Life Review* Winter, 1980. Vol. 6, No.1.
70. *Id.* at 13-14.
71. *Id.* at 14.
72. *Id.* at 16.
73. *Id.* at 17.
74. *Id.* at 19.
75. 1976 *B.Y.U.L. Rev.* 605.
76. 410 U.S. at 154.
77. *Supra* notes 15, 16 and 17. See also, The Heritage Foundation, "The Abortion Right: 'A Constitutional Right of Unique Character,'" ("Backgrounder" paper, March 11, 1980).
78. Hook, '"Lord Monboddo' and the Supreme Court," *The New Leader* 11-15 (May 13, 1963). Reprinted in Mendelson, *The Supreme Court: Law and Discretion* (1967).
79. Utah Code Ann. § 78-3b-1 *et seq.*
80. E.g., Utah Code Ann. §§ 15-2-2 *et seq.* & 31-19-2.
81. Utah Code Ann. § 76-5-303 *et seq.*
82. Utah Code Ann. §§ 78-3a-30 through 39.
83. E.g., Utah Code Ann. §§ 76-7-102 (incest) and 76-10-1206.5 (child pornography).
84. E.g., Utah Code Ann. § 78-45-3 *et seq.*
85. Utah Code Ann. § 76-7-201 *et seq.*
86. Utah Code Ann. § 53-24 subsection 1.
87. *Id.* at subsection 3.
88. *Id.* at subsection 2.
89. *Id.* at subsection 4.
90. Utah Code Ann. § 78-11-6.
91. Utah Code Ann. §§ 78-11-20 and 21. Of course, the statutes listed here are only a portion of an entire body of similar child- and family-protective legislation.
92. The statute is in the text accompanying note 46, *supra.*
93. 410 U.S. at 163 (emphasis added).
94. *Id.*
95. U.S. Const. art. 1, §9, cl. 7, reads, in part: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; . . . ."
96. 477 F. Supp. 542 (1979).
97. *Id.* at 548.
98. *Id.*
99. 428 U.S. at 65.
100. The plaintiff argued that the requirement for the *woman's own* informed and uncoerced consent was unconstitutional because it "imposed an extra layer and burden of regulation" on the abortion decision, and that it was "overbroad" and "vague." 428 U.S. at 66.

Social Values & The Federal Judiciary: The "Least Dangerous Branch" Unleashed

Robert A. Destro

ON JANUARY 15, 1980, Federal Judge John F. Dooling of Brooklyn held (in *McRae* v. *Harris*[1]) that the Hyde Amendment, barring the expenditure of federal funds for abortion, was unconstitutional. The 340-page opinion and 313-page appendix included everything from judicial ruminations on the effect of the Hyde Amendment on teenagers to a summary of the debates on the floors of the House and Senate. The opinion and appendix were lengthy indeed — some might even call them thorough — but, in the view of this writer, they are both irrelevant and dangerous.

The topic of this article is a limited one: judicial competence to resolve matters which are unquestionably within the realm of moral values and ethics. It is a topic epitomized by *McRae*, and the alternative theories upon which it was tried and resolved. It is also a topic illustrated with an even greater impact in the largely unseen and unappreciated field of parental rights to the education and custody of their children. The two are interrelated, and the picture which emerges on overview is not one which leaves much room for consolation. Judge Dooling's opinion is merely the tip of the iceberg: this article will try to illustrate, in general terms, the remainder.

When Judge Dooling decided that the Hyde Amendment was unconstitutional, his opinion rested on several alternative theories. We focus here on the so-called "religious" issue presented in *McRae*, and its relationship to judicial policy-making in all areas of life-ethics (e.g., "values education," euthanasia, sterilization, abortion).

When the American Civil Liberties Union, Planned Parenthood, and the Center for Constitutional Rights challenged the Hyde Amendment in the name of poor women, a key theory in their challenge was that the Hyde Amendment was an "establishment of religion" forbidden by the First Amendment to the Constitution of the United States.

The result, they claimed, was mandated by the current three-part

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test the Supreme Court uses to determine whether or not a law or program violates the First Amendment. That test requires the Court to determine whether:

1. The law has a "secular" purpose;
2. The law "advances" or "inhibits" religion; and
3. The law fosters excessive governmental entanglement with religion.[2]

The problem with the foregoing "test," however, is that it was not designed to perform the task presented in *McRae*: arbitration of social values. The result is a lengthy and confusing opinion which, at bottom, says nothing new.

In short, the plaintiffs in *McRae* argued that a value system which respects the unborn is inherently "religious" and unconstitu-tional, while one which holds that abortion is good social policy is "secular" and, therefore, constitutionally permissible. A glance at Judge Dooling's words demonstrates that the basis of his decision is that abortion is good social policy. The pro-funding forces argued this point, and Judge Dooling accepted it:

> The evidence requires the finding that by the professional standards of modern medicine adequate and timely treatment of pregnancy includes recourse to abortion, . . . that the abortion procedure is a means of safeguarding the health of pregnant women . . . Unwantedness itself is a factor deranging the management of pregnancy [and] . . . that the professional standards of modern medicine accept that grave fetal defect . . . may make abortion medically necessary in the judgment of a large part of the medical profession.[3]

The problem with this approach is two-fold: first, it is cloaked with the mantle of "constitutional" adjudication (giving it an aura of secular infallibility); second, it ignores the role of the values of the electorate in the shaping of public policy and arrogates ultimate political power to the judiciary.

The implications of such an approach to judicial power are enormous and are summarized in the companion articles on the judicial usurpation of the appropriations power by which Congress effectuates social policy. They are even more sobering when one considers that the *McRae* approach is also being applied by the federal judiciary and the pro-funding establishment to the process by which social *values* are defined.

By ruling that abortion is good social policy, and mandating that society must support it, the judiciary have become the architects of a new social order in which ultimate values are litigated and pro-

nounced rather than thrashed out in the political arena. Religion (in the traditional sense) is given no place in the process except as an example to be rejected as unfit for public discourse because of its "divisive" political potential, or as a pawn to be manipulated to demonstrate its "mainstream" acceptance of "modern" ethical and social values.

Ultimate values, in this context, are both "religious" and "secular" depending on the immediate need of the judge or advocate, and the result of each case is governed not so much by a rule of law as it is by the judicial perception of "good" public policy. *McRae* is illustrative of judicial perception run amok, but several other cases show that Judge Dooling is merely following standard operating procedure.

The Judges and the Family: The Constitutional Politics of Values Education

The unique role of the family in our society has been recognized on many occasions by the Supreme Court.[5] It is "the institution by which we 'inculcate and pass down many of our most cherished values, moral and cultural,'" but it is also an institution which is increasingly under attack for a number of reasons. Perhaps the most obvious of these reasons is the continuing controversy over the values which define public policy governing abortion, "values education," sexual behavior, euthanasia and sterilization.

The common law imposes a duty on parents to care for, protect and guide their children, and allows delegation of that duty to others; but such delegation is not operative to grant prerogatives coextensive with those of parents.[6] Within the framework of current constitutional adjudication, however, it appears that there has been a shift toward a perception of the family which holds that the parents exercise only powers delegated by the state, that the state may influence the "values education" process through parental exclusion[7] and that governmental recognition of parental prerogatives is limited by currently accepted constitutional theory.[8] It is within the shifting conceptual framework of state-parent-child relationships that much of the current debate and litigation over "family," "parents'" and "children's" rights occurs, but the subject matter is often abortion-related, and the results are often as devastating to the family as *McRae* is to the democratic process.

Under the traditional approach to state-family relationships, the state has no role in the parent-child relationship unless and until

there is a showing that that relationship has broken down, and that harm threatens the best interests of the children.[9] Although not often articulated in the cases, the state's role as the ultimate protector of children rests upon both their lack of capacity and their need for guidance in determining their immediate educational, physical and psychological needs.[10] Until recently, it has not rested to any great degree on a judicial perception of whether parental values are in the "best interests of the child," and the extent to which parental prerogatives are controlling.

Before undertaking an analysis of the "best interests" standard as it is currently applied, it is appropriate to note that no exposition on this topic would be complete without mentioning the concept of "children's rights."[11] *In re Gault*[12] was the first of a line of cases recognizing that, as between the state and the minor child, the Constitution will limit the exercise of state power to amorphous, but developing parameters which appear to depend upon the nature of the interests asserted.[13]

The application of the *Gault* line of cases in the context of a constitutionally-based family policy requires extensive discussion, but for present purposes, it is appropriate to note that the concept of "children's rights" immeasureably complicates the traditional notion of state-parent-child relationships. As currently applied, the *Gault* line of cases represents a basic shift in focus from that of the traditional model, which sees the child as a part of the societal and family unit, to one in which the child is seen as an individual within both society and the family.[14] It is the manner in which *Gault* and its progeny are applied to problems which reflect fundamental value choices which forms the basis for comparison of the "family" cases with *McRae*.

The *Gault* line of cases makes no mention of the application of the Constitution to parent-child relationships *inter se*. Some writers have seen these cases as creating constitutional "rights" in children which may be judicially enforced against the parents themselves, either directly or indirectly, through the concept of delegation of powers,[15] but it should be apparent that such a concept of the family can have a profound effect on the formulation of governmental policy toward the family. Review of the current case law, however, reveals very little appreciation by the judiciary of the fact that fundamental change in the state-family balance is being urged in the

name of a more traditional form of constitutional adjudication. To date, the results have been disastrous.

Without launching into a detailed explanation of how the cases relate to one another, two areas of particular concern are worthy of mention: values education and abortion. They are most clearly illustrated by *Doe* v. *Irwin*[15] and *Akron Center for Reproductive Health* v. *The City of Akron.*[16]

The basic premise underlying the traditional solicitude for the rights of parents to nurture, educate and care for their children is "the importance of the familial relationship to the individuals and to the society [which] stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in 'promot[ing] a way of life' through the instruction of children, . . . as well as from the fact of blood relationship."[17] It has been held, therefore, that parents, at a minimum, have constitutional rights to:

> 1. Physical possession of the child, which, in the case of a custodial parent includes the day-to-day care and companionship of the child.
>
> 2. The right to discipline the child, which includes the right to inculcate the parent's moral and ethical standards.
>
> * * *
>
> 7. The right to prevent an adoption of the child without the parents' consent.[18]

Whether these rights are seen as derived from a properly-based conception of the rights of parents over children, or as adjuncts to substantive liberties of long standing or more recent vintage (e.g., freedom of religion or privacy), it seems that each of the foregoing rights has content much deeper than that which the Courts care to recognize.

The right to physical possession of the child is perhaps the most basic, and was recognized as such by the Supreme Court of the United States in *May* v. *Anderson.*[19] The laws of most states are very careful to permit interference with the parent-child relationship only if the welfare and protection of the child are seriously threatened, and provide strict safeguards to assure that the rights and well-being of both parents and children are preserved as much as possible.[20] Massachusetts, for example, presumes that parents are entitled to the custody and care of their children "unless the Probate Court finds the parents 'unfit to have such custody,' and the burden of proving unfitness is placed upon those challenging the parents." In keeping with this philosophy, the judicial authorities of Mas-

sachusetts have recognized that it is impossible for any inflexible standard to govern the "intricacies and subtleties of the parent-child relationship," but have not hesitated to formulate general criteria for determining whether parents are unfit:

> In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control unparental traits of characters or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from the other moral defects . . . *The unfitness of parents in this section of the statute must be determined with respect both to their own character, temperament, capacity, and conduct, and to the welfare of the child in connection with its age, environment and affections.*[21]

Given this general background, more recent cases dealing with the question of children's rights raise grave cause for concern. While it is true that *In re Gault* and its progeny stand for the proposition that minors have constitutional rights which may not be infringed by the state in its direct interactions with them, the courts appear to be transferring the alleged "right to privacy" analysis relied upon to create the right to abortion in *Roe* v. *Wade* to the resolution of real or imagined intra-familial disputes.[23]

Perhaps the biggest difficulty in summarizing the area is the courts' seeming lack of concern for intellectual consistency. The recent decision of the United States Supreme Court in *Bellotti* v. *Baird* (II)[24] is a classic example of an attempt to rationalize blatant interference with the family by lengthy citation to cases which support a different policy. The words in *Bellotti* v. *Baird* disclose what is a very disturbing trend in judicial oversight of the parent-child relationship. In defending its decision that a parents should not be informed of their minor daughter's decision to have an abortion, the Court stated: "We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions."[25] Taken together with the words of the United States District Court for the District of Colorado in *Foe* v. *Vanderhoof*,[26] a strong undercurrent of result-oriented decision-making can be detected.

> Those cases which have considered parental control of children have involved conflicts between the parents and the State wherein the courts have

> considered intrusions by the State into the area of parental values — particularly religious values. Cases which have upheld parental control have not involved the situation where the parent and child differ and the State is imposing the parents' views on the minor. These cases are thus inapplicable to the instant question.[27]

With this short background in mind, the decisions in *Doe* v. *Irwin* and *Akron Center* come into sharper focus. In *Doe* v. *Irwin*, the United States Court of Appeals for the Sixth Circuit held that a state-run education program which, in part, covered concepts of sexual morality was constitutional in the face of a claim that parental notification was required. The rationale of the court was, essentially, that the program was "voluntary" because the state did not mandate participation in the program and that it did not, technically, advertise the availability of the service. Whether the program is actually voluntary is questionable, considering the fact that the distribution of the contraceptives is held out as an inducement for a minor to enter the program. The minor quickly finds, however, that the actual distribution of the contraceptives is contingent upon participation in a mandatory 'rap' session which was found by the Sixth Circuit to be educational, and which the record showed included negative commentary on parental moral views.

In *Akron Center for Reproductive Health* v. *The City of Akron*, the issue was parental notification prior to abortion. The Akron ordinance in question required parental notification by the clinic or a judicial proceeding which would determine whether or not the minor was capable of giving informed consent. The judicial proceeding contemplated was a typical juvenile court proceeding which would proceed in the traditional manner of a neglect hearing or a request for emergency medical treatment. In a decision handed down on August 22, 1979, the United States District Court for the Northern District of Ohio held that the statute was unconstitutional because the Court felt that a juvenile court, or some other agency of the state which would make the maturity determination, must have the flexibility to exclude parents from the decision-making process. The Court felt that parental exclusion might be necessary to protect both the child's best interests and, incredibly, the parents' own best interests.[28]

Taken together, the analysis of the two cases presents a quandary to anyone attempting to analyze the current position of the family. Traditional case law holds that parents have the ultimate authority

to educate, control, and nurture their children. In *Wisconsin* v. *Yoder*,[29] for example, the Supreme Court held that Amish parents had a right to remove their children from school notwithstanding the Wisconsin compulsory education law. But Justice Douglas, both concurring and dissenting, felt that the child should make the determination and that the Court should examine what the child believes prior to coming to its conclusion. After *Doe* v. *Irwin, Bellotti* v. *Baird* and *Akron Center*, it appears that the courts have now adopted Justice Douglas' line of reasoning, notwithstanding undisputed expert opinion that most minors are not capable of determining what is in their own best interests.

In both *Doe* v. *Irwin* and *Akron Center*, the evidence presented to the court showed that minors are often immature and are easily influenced by peer pressure and authority figures. In both cases, the evidence demonstrated that the counseling and 'rap' sessions were inherently educational and were designed to influence the child's moral views with respect to abortion, pre-marital sex and birth control. Nevertheless, the courts held that the state was permitted to play a central role in the shaping of these values and did not have to notify the parents of either the fact of its educational function or the substance of the education it was providing. The mechanism by which the courts accomplish this seemingly-incomprehensible feat is a dual application of the "best interests of the child" standard and the "right of privacy" enunciated in *Roe* v. *Wade*.

In *May* v. *Anderson*, Mr. Justice Frankfurter noted that "Children have a very special place in life which law should reflect, [and that legal] theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children."[30] Professor Robert Mnookin, active in the "Childhood and Government" program at the University of California, Berkeley, has sounded the same alarm in more modern terms:

> It is hard to transact intellectual business in the coin of either the liberators or the child savers. Kid libbers have transmogrified the traditional conceptions of right and liberty. At the core of the civil rights movement and the women's movement has stood the idea that a person's legal autonomy should not be made dependent upon race or sex; it is straightforward and intelligible. By contrast the broad assertion that age is also irrelevant to legal autonomy inescapably collides with biological and economic reality. *Because the young are necessarily dependent for some period after birth, the relevant*

question is often who should have the power to decide on behalf of the child.[31]

In the area of birth control and abortion, the courts have adopted the arguments of both the "kid libbers" and "child savers"[32] (i.e. Planned Parenthood and the abortion clinic establishment) that an abortion is always in the best interests of a minor. The testimony of the abortion clinic experts in *Akron Center* is replete with such allegations. In *Doe* v. *Irwin*, the United States Court of Appeals for the Sixth Circuit held that there was "no unconstitutional interference with the plantiffs' rights as parents,"[33] but ignored testimony in the record which identified the state's primary fear to be opposition to the *moral views* transmitted in the educational sessions required as a precondition to the distribution of free contraceptives. Both courts, therefore, cast a blind eye to the realities of the practices at issue in order to preserve policies which they apparently feel are in the "best interests" of the minors involved and society as a whole.[34]

As Professor Mnookin has noted, those who fall into the category of "kid libbers" contend that children have independent rights which can be enforced against their parents by the courts. In both *Akron Center* and *Doe* v. *Irwin* such rights were expressly recognized by the dual application of both "kid lib" and "child saver" theory.[35] Since most federal courts which have considered family issues now feel that the traditional mode of analysis required by *Wisconsin* v. *Yoder* is not applicable when there is an alleged intra-familial dispute, and that they are free to ignore the *effect* of their decision on the family structure whenever they are able to characterize the case as one which involves a minor's right to "privacy," the result is a federal judiciary with *carte blanche* to determine which parental views are in the "best interests" of the child and which are not. Both *Akron* and *Irwin* demonstrate that the courts will not hesitate to rely on "experts" who feel that the parents' views are outmoded or unliberated, and that the result is to supplant the parents' teaching authority by that of the state.

The shift in controlling philosophy is unmistakable, for in *Wisconsin* v. *Yoder*, the Supreme Court recognized that:

> Recognition of the claim of the state . . . would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a state into family decisions in the area of religious training would give rise to grave questions of religious freedom

comparable to those raised here and in *Pierce* v. *Society of Sisters* 268 U.S. 510 (1925).

* * *

Indeed it seems clear that if the State is empowered, as *parens patriae* to "save" a child from himself or his parents; . . . the State will in large measure influence, if not determine, the religious future of the child.[36]

Notwithstanding the strong language quoted above, the Supreme Court has now opted for what appears to be a case-by-case analysis. In *Bellotti* (II) it held that abortion was a special case, and affirmed a lower court decision which utilized the right to privacy and "best interests" standard to "save" the child from the religious views of her parents. In *Doe* v. *Irwin* the Sixth Circuit has now adopted the privacy rationale to protect what it apparently feels to be a valuable educational program from parents who might disagree with its content or approach. In *Akron Center* the court felt that a parent could be excluded from a juvenile proceeding which has the effect of a temporary transfer of custody if the exclusion was felt to be in either the child's or the parents' "best interests."

The result of all this, of course, is to leave the protection of parental rights to the unfettered discretion of federal courts relying on "experts" who do not share the parents' moral views. In the words of Professor Caplow:

At present, all three branches are busy recreating the American family in no particular image. Their efforts are complex to begin with and become more complex as they prove faulty and are repeatedly repaired and patched. At the heart of the government's inability to improve family arrangements is a fundamental lack of understanding of the nature of the family structure.[37]

The heart of the difficulty in both the parental-rights cases and the recent decision of Judge Dooling in *McRae* is that the judges simply do not understand that their role in our constitutional society is a limited one. "The judiciary," wrote Hamilton, "will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[38] Where, as here, the judges have taken it upon themselves to decide what is "best" for both individuals and for society as a whole they have crossed the line between the political and judicial arenas. They become, in effect, legislative tribunals without political checks and balances. Alexander Hamilton wisely noted the danger of such a development:

For I agree that "there is no liberty if the power of judging be not separated

> from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; . . .[39]

The development Hamilton feared has come to pass in *McRae* and other cases touching on the life issues. All that is needed now is public awareness.

Conclusion

When the Supreme Court decided the *Abortion Cases* in 1973, the American public could not have known that it was about to witness the restructuring of deeply-held social values in the name of the "right to privacy." That right has now become the basis for forcing private citizens to defray the cost of abortions performed on others, and to deprive them of the knowledge that the government and the abortion establishment is teaching their children that abortion is an inherent social good. The public policy questions presented by a governmental system in which the judiciary appoints itself to be the ultimate arbiter of social values are immense.

Because it involves the expenditure of public funds, Judge Dooling's decision in *McRae* is merely the most blatant example of judicial policy-making. Unfortunately, he is not alone. His colleagues in the judiciary have been attempting to shape the future complexion of American social values regarding life issues since before *Roe* v. *Wade*. It is going to take a constitutional amendment to change their course.

NOTES

1. 78 Civ. 1804 (E.D.N.Y. January 15, 1980).
2. See *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).
3. *McRae* v. *Harris, supra* note 1, slip opinion dated January 15, 1980 at pp. 308-309.
4. Fortunately, however, the religious "divisiveness" theory has been rejected in every case in which the courts have reached the merits of the argument. See, e.g., *Akron Center for Reproductive Health* v. *City of Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979); *Women's Center P.C.* v. *Thone*, No. CV78-L-289 (D. Nebraska November 9, 1979); *Committee to Defend Reproductive Rights* v. *Myers*, 93 Cal. App. 3d 492, 156 Cal. Rptr. 73 (1979).
5. See e.g., *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 519 (1925).
6. Blackstone, *Commentaries on the Law of England* *446-59 (Lewis ed 1902).
7. See, e.g., *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976) (adopting a delegation of powers approach).
8. Compare, e.g., J. Holt, *Escape from Childhood* (1974); P. Wald, "Making Sense Out of the Rights of Youth," 4 *Human Rights* 13 (1974), with K. Kenmoton, *All Our Children* (Carnegie Council on Children 1977); R. Mnookin, "Children's Rights: Legal & Ethical Dilemmas," *The Transcript*, Summer 1978 (Boalt Hall — Univ. of California at Berkeley).
9. *Cf., Linn* v. *Linn*, No. 42539 (Neb.S.Ct. filed 1/13/80). Note 5 *infra*.
10. See generally *Ohio Rev.* Code Ch. 2151. J. Goldstein. A. Freud, A.J. Solnit, *Beyond the Best Interests of The Child* (1973).

11. See, e.g., *In re Snyder*, 85 Wash. 2d 182, 532 p. 2d 278 (1975).
12. 387 U.S. 1 (1967).
13. See, e.g., *Parham* v. *J.L.*, 99 S.Ct. 2493 (1979); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969).
14. See, e.g., *Bellotti* v. *Baird*, 99 S.Ct. 3035 (1979); *Doe* v. *Irwin*, No. 78-1056 (6th Cir. Feb. 26, 1980); *Foe* v. *Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975); *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554 (E.D. PA 1974); *In re Snyder, supra* n.6; See note 3 *supra*.
15. No. 78-1056 (6th Cir. Feb. 26, 1980).
16. 479 F. Supp. 1172 (N.D. Ohio 1979).
17. *Wisconsin* v. *Yoder*, 406 U.S. 205, 231-233 (1972).
18. *L.A.M.* v. *Alaska*, 547 p. 2d 827, 832-833 n. 13 (1976). *Accord Stanley* v. *Illinois*, 405 U.S. 645 (1971). But *cf. Quilloin* v. *Walcott*, 434 U.S. 246 (1977).
19. 345 U.S. 528 (1953).
20. E.g., *Mass Gen. Laws* ch. 119; *Ohio Rev. Code* ch. 2151.
21. *Richards* v. *Forest*, 278 Mass 547, 180 N.E. 508, 510-511 (1932) (emphasis added).
22. 410 U.S. 113 (1973).
23. See *Snyder* v. *State, supra*, and discussion of the facts in Comment, *Status Offenses and the Status of Children's Rights: Do children Have the Legal Right to be incorrigible*? 1976 B.Y.U.L. Rev. 659.
24. 99 S.Ct. 3035 (1979), *aff'g* 450 F. Supp. 997 (D. Mass 1978).
25. *Bellotti* v. *Baird*, 450 F. Supp. 997, 1001 (D. Mass. 1978).
26. 389 F. Supp. 947 (D. Colo. 1975).
27. *Id.*, at 956.
28. Slip opinion at 52-53, *Akron Center, supra*, note 4.
29. 406 U.S. 205 (1972).
30. 345 U.S. 528 (1953).
31. R.H. Mnookin, "Children's Rights: Legal and Ethical Dilemmas," *The Transcript*, Summer 1978, p. 53.
32. The terms are Professor Mnookin's.
33. Slip opinion at 13, *Doe* v. *Irwin, supra*, note 14.
34. Compare *Bellotti* v. *Baird* (II), *supra*.
35. See Slip opinions at 49-53 and 8-9 respectively. See *Foe* v. *Vanderhoof, supra; Planned Parenthood Assn.* v. *Fitzpatrick, supra*.
36. 406 U.S. at 231, 232.
37. Caplow, "The Loco Parent: Federal Policy and Family Life," 1976 B.Y.U.L. Rev. 709, 711.
38. Alexander Hamilton, *The Federalist*, No. 78 (Wright ed., 1961) at 490.
39. Hamilton, *The Federalist, supra* at 491.

Perverting the Power of the Purse

Basile J. Uddo

WHEN THE FRAMERS of our Constitution gathered in Philadelphia in 1787 there was nothing close to total agreement among the delegates to the Constitutional Convention on most issues that would face them. At a minimum it was accepted that the Articles of Confederation were in many ways deficient: improvement was the basic work and long-term hope of the Convention. Beyond that, opinions were as varied as the attendants themselves. But for all of the disagreements, large and small, the debates reflect one point of consistency — no one thought that the purse strings of the government should be in the hands of anyone other than the people's direct representatives.

Just how strongly that view was held is demonstrated in several passages in which delegates argued the merits of limiting the *origination* of "money" bills to the House of Representatives. The debate was particularly intense because at the time it was thought that the Senators would not be elected directly by the people of the states, but by the state legislatures.[1] That extra step — once removed from direct election — caused great concern over the degree of power the less-representative Senators should have over the purse.

James Madison's notes on the debate reflect the concern of Elbridge Gerry, a delegate from Massachusetts who "moved ro restrain the Senatorial branch from originating money bills. The other branch was more immediately the representatives of the people and it was a *maxim that the people ought to hold the purse strings.*"[2] None other than Benjamin Franklin endorsed the motion and again Madison's notes explain why:

> But as it had been asked what would be the use of restraining the second branch from meddling with money bills, he could not but remark that it was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim that those who feel can best judge. This end would, he thought, be best attained if money affairs were to be confined to the immediate representatives of the people.[3]

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Statements of support were many and on point. Gerry again: "Taxation and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses."[4] Some others went so far as to suggest that the Senate should not be allowed even to "alter or amend" money bills, but that seemed a less pervasive concern.

To be sure several delegates thought that the Senate would be representative "enough" to allow them to originate money bills and wield powers indistinguishable from the House, but even they saw the critical need for responsiveness to the people as indispensable. As James Wilson of Pennsylvania put it: "Where is the difference, in which branch it begins, if both must concur, in the end?"[5] Finally, the protectors of the purse prevailed and the House became the official originator of all revenue bills,[6] and the consistent customary originator of all money bills.[7] Imagine, then, the surprise those delegates would experience at learning that their hard-fought protection of the purse from all but the most directly-responsive body has been ignored by a single federal judge in Brooklyn. How shocked would they be to learn that the money power has not been usurped by a *less* representative legislative body, but by a non-representative, life-tenured judge? The answer, of course, is quite shocked, perhaps outraged. And, yet, that is precisely what has happened.

When Judge John Dooling declared the Hyde Amendment unconstitutional, he did more than exercise the power of judicial review: in addition, he "brushed aside" — as the New York *Times* approvingly said — the clear constitutional mandate that only Congress can appropriate funds. He did this by ignoring not only the text of the Constitution, but the rules and procedures of Congress. Also, he misunderstood two cases that he felt supported his unprecedented action. The net result is that Judge Dooling has laid the ground-work for the most serious constitutional crisis since the much-celebrated Nixon days.

To understand what has happened the proper starting point is the Constitution: Article I, section 9, clause 7, states in clear and unambiguous terms that "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." An appropriation is made by law only when it originates in the House and is duly enacted by both houses and signed by the President. Has there been such an appropriation to pay for most elective abortions under the

Medicaid Act? Quite the contrary. No bill appropriating such funds ever originated in the House, nor has such a bill been passed by both houses, nor has such a bill been *sent* to the President much less signed by him. Yet, the government is paying for such abortions under Judge Dooling's order.

What, in fact, Congress did do with the Hyde Amendment was to say that of all the money appropriated for the Medicaid program "None of the funds contained in [that] act shall be used to perform abortions" with certain specific exceptions. The Hyde Amendment, then, is an often-used type of rider, by which Congress has frequently refused to appropriate money for certain purposes.

Congressional understanding of the effect of such riders is clear in its own rules. Rule XXI of the Rules of the House of Representatives, the Holman Rule, says that such an amendment is accepted as "being germane to the subject matter of the bill" and as "retrench-[ing] expenditures by . . . the reduction of amounts of money covered by the [appropriation] bill."[8] The precedents of the House make it equally clear that the effect of such an amendment so received is to constitute a decision not to appropriate funds for the specified purpose.[9] Simply put, there are *no* funds appropriated for the proscribed purpose, and none can become available unless Congress appropriates them anew.

Judge Dooling's ruling simply ignores these points, and, consequently, the nature of the appropriation power. His order assumes that an appropriation act contains a general sum of money with certain conditions attached, which federal judges are free to ignore if they think them constitutionally impermissible. But such a view eliminates the entire policy role of Congress in deciding whether or not to appropriate in the first instance. Such a power assumed by federal judges, or the President for that matter, would be tantamount to a "line item" veto, which would make Congress a mere bookkeeper for the other branches of government. The people's most immediate representatives simply could not represent! A negative policy decision by Congress, becomes, by judicial sleight of hand, its opposite.

Quite realistically, such a subversion of the Constitution would do serious damage to our whole system. The effects would be felt far beyond abortion. It has been observed that riders similar to the one Judge Dooling rejected have been applied to appropriations as diverse as controlling water projects to ending the "police activities" in

Vietnam.[10] Once ignored in abortion funding it is no great leap to ignore such restrictions in all appropriation acts. Consequently, any group which has been frustrated on the Congressional level, by not receiving funding of its project, will certainly turn to the federal courts to obtain injunctions requiring the expenditure of funds Congress explicitly refused to spend. Surely, there are judges in our system who would find credence in virtually every such claim. In the end the feared fusion of distinct branches of government would become complete.

How, then, did Judge Dooling make such a mistake and set the stage for such a result. The reasons are two: a misreading of precedent, and an apparent assumption that federal courts certainly *must* be able to so act. On the precedent Judge Dooling thought he found support in two cases: *Lovett* v. *United States*[11] and *Califano* v. *Wescott*.[12] Contrary to Judge Dooling's opinion, *Lovett*, in fact, supports the opposite position and *Wescott* is inapplicable.

In *Lovett* three individuals challenged an act of Congress that prohibited payment of their salaries unless Congress confirmed their continued government employment. Despite the act the three individuals continued to work and sued in the Court of Claims for back salary. That court decided that the claimants had a right to the money, but never suggested that it could order Congress to appropriate, or the Treasury to pay, such funds. "Judgments, recovered here," said the court, "*may* be satisfied by an appropriation out of which the judgments *may* be by Act of Congress, payable."[13] No attempt was made to order payment; an appropriation act would be necessary for that.

In time the Supreme Court affirmed the Court of Claims, calling the salary exclusion an unconstitutional bill of attainder. But again, no order was made to appropriate or pay the funds. In fact, the plaintiffs would never have recovered their salaries had not the House, after much debate, voted 99-98 to appropriate the funds.[14] Consequently, one of the major building blocks of Judge Dooling's order crumbles under analysis.

So too is *Wescott* no precedent for judicial appropriation. In *Wescott* the Court was examining a Congressional scheme that provided certain unemployment benefits for fathers. The act was challenged as gender-based discrimination. The Supreme Court found the challenge meritorious and held that the program would have to extend to unemployed mothers as well. The critical differences be-

tween *Wescott* and the abortion funding cases are obvious. First, *Wescott* did not involve an exercise of the appropriation power by Congress. Second, and understandably, no appropriation conflict was argued to, or properly before, the Court. Consequently, *Wescott* is simply not concerned with the crucial appropriation conflict inherent in the Dooling order.

That leaves the Dooling order with the dubious support of an unarticulated and amorphous feeling that judges simply must be able to do this to make remedies real and protect certain basic principles. The problem with such an analysis is that it ignores the separation of powers by failing to distinguish between judicial review and the legislative act of appropriating money, and fails to realize that there really are some things judges are not supposed to do.

The separation of powers is clear in the Constitution. While no one disputes the judiciary's right to determine the constitutionality of Congressional acts, it does not follow that such a declaration brings with it the right to exercise a power textually committed to another governmental branch. In fact, the opposite is true. The Court might declare an appropriation limitation unconstitutional, but the Congress must be left free to choose between not funding the whole scheme in question or adhering to the Court's criteria on the offending limitation. Presumably, the pulling and tugging of the democratic political processes will have their intended effect upon which option the Congress chooses.

What it comes down to is dependence upon the intended scheme of mutual respect among the branches of government. When the Court addresses itself to those powers explicitly committed to other branches, *e.g.* appropriations, decisions to tax or make war, etc., the Court may speak but not compel. Enforcement comes from a respect for the well-reasoned teaching of the co-equal Court.

But in addition to the separation of powers there is the important institutional concern which must be respected. Simply put, a court is not a good place for making appropriation decisions.

An appropriation bill must travel a most elaborate legislative process from its original introduction to its final signing by the President. This process includes a House appropriations committee which is equipped to gather a maximum amount of information about the appropriation request. Unfettered by the more technical rules of procedure and evidence that prevail in a court, this commit-

tee may develop a fuller sense of the need for the programs and funds.

After the appropriations committee the bill receives additional examination and debate in the House. Once passed in the House a similar route is followed in the Senate. Amendments may be attached in the Senate, which then must be acted on by the House. Eventually, differences may exist that will require a joint House/Senate conference committee wherein the pulling and tugging of the process will reach eventual compromise.

Through it all the people's most immediate representatives are gathering information, setting priorities, integrating the instant bill with the overall budget and making decisions on what is essential and what is superficial. Just now, too, legislators must also consider what is consistent with anti-inflation budget cuts. Finally, the process produces a result for which elected representatives must answer at the polling booths.

Obviously, a court lacks most of these mechanisms and is presented with a very narrow view of a very limited question that simply cannot provide the data for making complex funding decisions. When a court orders the funding of A it cannot possibly know if that means X,Y, or Z will go unfunded. Of course, under the Dooling approach, X,Y, and Z too will eventually lay their claims before the courts, and ask for some further judicial surgery on the federal fisc. The courts will become lost in something they do poorly, and their mistakes will be nearly impossible to remedy. The courthouse is simply no match for the statehouse when it comes to spending the people's money.

This rule that in some areas a court can go so far and no further, and that some things are not meant for judges, is not newly discovered, nor would it have shocked most people who have lived under our Constitution. In fact Judge Dooling, and those who influenced his thinking in the abortion funding case, are the first to suggest otherwise.

The most influential contemporaries of the Constitution — James Madison and Alexander Hamilton — did not hesitate over the suggestion that only Congress controls the purse strings. Both used their Federalist Papers to drive home the point.

Madison said in his Federalist Paper No. 58:

> The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government. They, in a

> word, hold the purse — that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance and for carrying into effect every just and salutary measure.[15]

Hamilton was as firm in his Federalist Paper No. 78:

> The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither *Force* nor *Will* but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment.[16]

This clear and unambiguous exclusion of the judiciary from the public purse was not, however, a proposition limited to the idealistic framers of the Constitution, nor to the great defenders of its principles. Courts, and more detached commentators, have not stumbled over the obvious.

Writing in 1833, then Professor (later Justice) Joseph Story confronted the question directly in his famous *Commentaries on the Constitution of the United States.* Speaking of the appropriation power he said:

> The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes.
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>
> It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied, with unshrinking honesty to such objects, as legitimately belong to the common defense, and the general welfare. Congress is made the guardian of this treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know, what money is expended, for what purpose, and by what authority.[17]

Story went on to speak more specifically to the relationship between

Congress and the judiciary with respect to moneys due and the appropriation power.

> A learned commentator has, however, thought, that the provision, though generally excellent, is defective in not having enabled the creditors of the government, and other persons having vested claims against it, to recover, and to be paid the amount judicially ascertained to be due to them out of the public treasury, without any appropriation. Perhaps it is a defect. And yet it is by no means certain, that evils of an opposite nature might not arise, if the debts, judicially ascertained to be due to an individual by a regular judgment, were to be paid, of course, out of the public treasury. It might give an opportunity for collusion and corruption in the management of suits between the claimant, and the officers of the government, entrusted with the performance of this duty. . . . But still, the known fact, that the subject must pass in review before congress, induces a caution and integrity in making and substantiating claims, which would in a great measure be done away, if the claim were subject to no restraint, and no revision.[18]

Joseph Story knew well that a court could not do what Judge Dooling has done, but saw clearly the wisdom of putting some things beyond the control of the non-representative, life-tenured federal judge.

Similarly, every court, until now, has understood the problem and respected the constitutional division. After the Civil War several cases arose in which Rebels whose property had been confiscated by the Union government sought its return or money value when, in time, they were pardoned for their part in the Rebellion. Each case respected the exclusive power of Congress over appropriations.

In one example, *Knote* v. *United States*,[19] the Supreme Court's reply was clear ". . . if the proceeds [of confiscated property] have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former *owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.*"[20]

Earlier in *Reeside* v. *Walker*[21] the Supreme Court was specific and firm. "No officer, however high, not even the President, much less the secretary of the treasury or treasurer is empowered to pay debts of the United States generally, when presented to them. . . . The difficulty in the way is the want of any appropriation by congress to pay this claim. . . . However much money may be in the

treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned."[22]

Finally, in more modern times, this unblemished principle was followed, in addition to *Lovett*, in a case dealing with the exact facts before Judge Dooling — the constitutionality *vel non* of the Hyde Amendment. In *Doe* v. *Matthews*[23] Judge Buinno went to the heart of the issue: "Neither the complaint, the moving papers nor the initial brief discusses [the appropriation question]. Yet it cannot be avoided because, on the record before the Court, the Congress simply has not appropriated any moneys . . . to reimburse Medicaid States with a federal share for elective abortions."[24]

The chain is unbroken. The framers of the constitution saw the power of the purse as exclusively within Congressional control. The contemporaneous commentators saw the judiciary as the branch without "purse or sword," and fully approved. The later commentators, with some years of experience under the Constitution, were similarly certain of the scheme, and impressed with its wisdom. Finally, in the courts themselves every judge who ever faced the question, before Judge Dooling, respected and affirmed the basic separation of powers.

Now, a single, federal judge has threatened this clearest of all constitutional principles. His way leaves a dim prospect known throughout our history, that is, the development of a kind of aristocracy within a system that knows no such concept.

George Mason, a convention delegate from Virginia, saw the prospect in the money-power debates. His concern over even the less-representative Senate's power in money matters is reflected in Madison's convention notes:

> His idea of an aristocracy was that it was the government of the few over the many. An aristocratic body, like the screw in mechanics, working its way by slow degrees, and holding fast whatever it gains, should ever be suspected of an encroaching tendency. The purse strings should never be put into its hands.[25]

How much more would he have feared such an inexorable result were it ever to have been suggested to the Convention that the judiciary might have a power over appropriations.

Professor Story echoed a similar concern. "In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, and is beyond responsibility or reproof."[26] Princes and federal judges are not directly answerable to

the people, Congress is. If for no other reason, Judge Dooling's order should be reversed.

But there is another reason. The Constitution requires reversal. What is brewing is a direct conflict between Congress and the Court. If Judge Dooling is affirmed the judiciary will have taken something, which in law, it has no right to possess: the power of the purse. Congress will not be able to tolerate this usurpation and will certainly need to reassert its exclusive appropriation power. The damage to both branches could be significant, and the orderly development of constitutional law based upon a mutual respect among co-equal branches will have been set back immeasurably. This need not happen. The mistake must be admitted; the order reversed, and the balance restored.

Notes

1. This was in fact how Senators were elected until the passage of the Seventeenth Amendment in 1913, which initiated the present method.
2. A. Prescott, *Drafting the Federal Constitution* 433 (1968) (Hereinafter *Prescott.*)
3. *Id.* at 437.
4. *Id.* at 444.
5. *Id.* at 436.
6. U.S. Const. art. I, sec. 7, cl 1.
7. "The Constitution definitely states that all revenue measures must arise in the House of Representatives and practice has extended this to appropriation measures . . . The House is very jealous of its rights and prerogatives and frequently discloses this attitude." F. Riddick, *The United States Congress Organization and Procedure* 282 (1949).
8. *Constitution, Jefferson's Manual and Rules of the House of Representatives,* Sec. 835 (ed. Deschler, 1967).
9. Cannon, *Precedents of the House of Representative,* 7.
10. Democratic Study Group of the United States, House of Representatives, "The Appropriations Rider Controversy," Special Report No. 95-12, February 14, 1978.
11. 66 F. Supp. 142 (Ct. Cl. 1945) *aff'd on other grounds, United States* v. *Lovett*, 328 U. S. 303 (1946).
12. ____ U. S. ____, 61 L. Ed. 2d 382 (1979).
13. 66 F. Supp. at 147 (emphasis added).
14. 93 *Cong. Rec.* 2973-75, 2977, 2987-91 (1947). Many statements during those debates indicate that the Congressmen understood they had the power to refuse to appropriate the funds.
15. *The Federalist* No. 58 at 380 (Modern Library ed.) (J. Madison).
16. *Id.* at 504 (A. Hamilton).
17. 3 J. Story, *Commentaries on the Constitution of the United States*, 213-14 (1833) (Hereinafter *Commentaries*).
18. *Id.* at 214-15.
19. 95 U. S. 149 (1877).
20. 95 U. S. at 154 (emphasis added).
21. 52 U. S. (11 How) 632 (1850).
22. 52 U. S. (11 How) at 626-628.
23. 420 F. Supp. 865 (D. N. J. 1976).
24. 420 F. Supp. at 870.
25. *Prescott supra*, at 438.
26. *Commentaries, supra*, at 214.

Manipulating the Terms of Life

Robert M. Byrn

ABSENT THE SORDID SEDUCTION of knavish court personnel — which though journalistically modish, remains professionally repugnant —lawyers possess no unerring guide for reading the judicial mind. The most obvious sources, the decisions of courts, are not always what they seem. For instance, a majority opinion of the United States Supreme Court may have been so loosely tailored to achieve a compromise consensus that the end product does not comfortably fit the thinking of any of the majority Justices. For that reason individual members of the majority sometimes write separate concurring opinions "clarifying" the majority rationale. But the concurrences may be arcanely nuanced to respond to the original compromise, their significance lost to all except those in privity to the compromise — the Justices themselves. Even in a litigation of pervasive national import, it is possible that neither the predominant majority rationale nor the particular concerns of individual Justices will emerge until the court has handed down a series of decisions on different aspects of the same issue. One may then sift the shifting majorities, the explicated concurrences, and the polarized dissents to discover what it all means. The whole process may seem haphazard but, at times, it is the way that the Supreme Court makes law.

So it is with abortion. After five sets of Supreme Court decisions, with multiple concurrences and dissents, it seems safe to sift. Perhaps not safe, but at least worthwhile because there appears to have been a significant change of tone, a hardening of positions.

Three dissenters on the court now call licensed terminators of pregnancies "abortionists."[1] On the other side, a case-hardened majority has formed an impregnable anti-fetus phalanx. The majority, though remaining aristocratically aloof from the fundamental issue of what a fetus is, stands ever ready to redefine fetal life in order to facilitate its (or his or her) destruction. Admittedly, peripheral questions of government funding and the roles of spouses and parents in

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the abortion decision, once thought settled, are being rehashed or muddled or both. Caught as they were to begin with in a web of bad law, the Justices may squirm and flip-flop on these side issues, but let us not be deluded. On the main issue the hard core majority is irrevocably committed to its threshold errors.

It is with the main issue and how it has progressed through the cases that this article is concerned. Proponents of a Human Life Amendment have an obligation to keep themselves and the Congress keenly and constantly alert to what the Supreme Court is doing to human life.

A. The Background

In his recent, acutely perceptive book on abortion, Professor John Noonan identified the "political constituencies" of the liberty to abort.[2] Professional libertarians, population planners, feminists, welfare administrators and physicians all had axes to grind. Some were motivated by a better-dead-than-poor altruism. Libertarians and feminists detected in the altruists' quality-of-life sloganeering a theme in harmony with their own rallying cry of a woman's right to control her own body (and lifestyle). Pro-abortion physicians merged these two interests in their claim to an almost unqualified right to practice their profession, according to their own best judgment, for the complete well-being of their abortion-seeking patients.

The concerns of all the groups were compatible to a degree, but, as it turned out, not completely congruent. The feminist/libertarian bloc won the liberty to abort a healthy child, but seemed to have lost the liberty to bear a defective one.[3] The absolutist bloc's loss was only a temporary gain for the quality-control/depopulation alliance. It all turned to gall when the alliance learned that the liberty to abort did not include a right to state funding or facilitation of abortions.[4] Some now argue that the only clear winners to date have been the abortionists who appear to have emerged as the final arbiters and keepers of the new liberty. Perhaps they are right.

Certainly the abortionist was kingpin in the 1973 decisions. "The abortion decision in all its aspects is inherently, and primarily a medical decision, and the basic responsibility for it must rest with the physician."[5] "This allows the attending physician the room he needs to make his best medical judgment, and it is room that operates for the benefit, not the disadvantage, of the pregnant woman."[6] "The [*Wade*] decision vindicates the right of the physician to admin-

ister medical treatment according to his professional judgment. . . ."[7] One might, indeed, conclude that the woman's right of privacy was no more than a jerry-rigged rationalization to "vindicate the right of the physician."

Subsequent Supreme Court decisions also subserved the abortionist. In *Planned Parenthood* v. *Danforth*,[8] plaintiffs challenged the constitutionality of a number of provisions of the Missouri abortion statute, among them a section which forbade the use of saline injection as an abortion technique. The state defended the section as a proper exercise of its compelling interest (acknowledged in *Wade*) in protecting the health of those abortion-seeking women who have passed the first trimester of pregnancy. The District Court upheld the provision upon a trial record which not only supported the legislature's finding that saline is "deleterious to maternal health" but also demonstrated the existence of safer techniques. The Supreme Court struck it down, giving as the first reason for the reversal: "It [the District Court] did not recognize the prevalence, as the record conclusively demonstrates, of the use of saline amniocentesis as an accepted medical procedure in this country. . . ."[9] Or to put it another way: The state's power to regulate post-first trimester abortions for the protection of the woman's health is subordinate to the common medical practices of abortionists, no matter how dangerous those practices might be.

No less for the convenience of abortionists was the court's decision on another of the issues in *Danforth.* A section of the Missouri statute mandated that "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." The Court tortured the language so that it was made to apply to pre-viability abortions which, *per Wade*, could not be regulated by the state for the benefit of the unborn.[10] This made no sense. As Justice White observed in dissent, "Plainly, if the pregnancy is to be terminated at a time when there is no chance of life outside the womb, a physician would not be required to exercise any care or skill to preserve the life of the fetus during abortion. . . ."[11] The logic is compelling. But if, as has been suggested, the abortion decisions are to be appreciated as a *carte blanche* for licensed abortionists, then even logic

may be banned. Nothing is to be allowed to interfere with the licensed abortionist on his killing rounds.

This article is not about the killers, but the killed. I have dwelt on the killers only because their enshrinement by the court may help to explain the constant judicial manipulation of fetal life into the path of the curette. It is, perhaps, the one constant in the abortion decisions.

B. Manipulating Viability

1. *Roe* v. *Wade*

In *Wade*, the "embryo" and "later the fetus"[12] were variously referred to, without differentiation, as "potential human life" and "potential life."[14] The Court conceded that the state has an "important and legitimate interest in protecting" this potential,[15] but this interest becomes compelling only at viability.[16] Viability was defined as "potentially able to live outside the mother's womb, albeit with artificial aid. . . .The fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justification."[17]

The Court's definition of viability incorporated "artificial aid," but the emphasis was on the fetus, not the machine. Viability is a fetal attribute, not a mechanical one. The justification is "biological," not technological. The fetus "has the capability"; the machine does not confer it; the machine supports it. The state has a compelling interest in the viable fetus because the viable fetus is valuable *in se*, and the viable fetus is valuable *in se* because biologically the fetus has the potentiality of meaningful life outside the womb "albeit [even though] with artificial aid." The viable fetus, though only potentially a human life, is possessed of a modicum of value *qua* human.

2. *Planned Parenthood* v. *Danforth.*

Among the portions of the Missouri statute not challenged in *Danforth* was a section which dictated that "No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable." In turn, viability was defined as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-support systems."

Plaintiffs challenged the definition, but the Court found it consistent with *Wade*. "Indeed, one might argue . . . that the presence of the statute's words 'continued indefinitely' favor, rather than disfavor, the appellants, for, arguably, the point when life can be 'continued indefinitely outside the womb' may well occur later in pregnancy than the point where the fetus is 'potentially able to live outside the mother's womb.'"[18]

At the time, I was, I confess, encouraged by this language. Could it be that the court, responding to widespread criticism, had decided to ameliorate *Wade* by pushing viability back into an earlier gestational stage? As it turned out, such was not the case, and a cautious, rather than a rosy, reading of the decision would have revealed it. The clues were there:

First. The emphasis in the definition of viability was changed from the intrinsic (the fetus) to the extrinsic (the machine and the abortionist), from the biological (the fetus) to the technological (the machine) and the judgmental (the abortionist). As the Court put it: "Viability [is] a point purposefully left flexible for professional determination and [is] dependent upon developing medical skill and technical ability. . . . We recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term. . . . The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."[19] In short, the fetus is not worthy *in se*; rather the worth of this "potential life" is a function of the current state of the abortional and technological arts. The devaluation of the fetus obviously diminishes the state's interest in protecting the fetus.

Second: The majority could afford to toss a sop to the dissenters because whether the fetus was viable or not was of no consequence in the unchallenged certification section of the statute (quoted above). As Justices Stewart and Powell took pains to point out in their concurrence, "The State has merely required physicians performing abortions to *certify* that the fetus to be aborted is not viable. While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. *There is thus little chance that a physician's professional decision to perform an abortion will be 'chilled.'*"[2]

Third: Viability was important in the section of the statute which

prescribed the care the abortionist was required to exercise to preserve the life and health of the aborted fetus. As noted above, the Court voided that section.

On reflection, the reason for the hard-core majority's flank assault on viability in *Danforth* is obvious. States were finding ways to protect a viable fetus, a development the majority had not anticipated.

In *Wade* the Court had held that for the stage subsequent to viability the state may proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[21] What the Court gave, it took away.

Even in the first trimester when states may not regulate abortion at all, the doctor still is called upon to make "a medical decision,"[22] to use his "best clinical judgment,"[23] and he is free to perform an abortion "wherever his medical judgment, properly and professionally exercised, so dictates and directs him."[24] In short, the doctor has an obligation and concomitant right to decide whether the abortion is "necessary for a patient's physical or mental health," and health includes "all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient."[25] This means, for all practical purposes, that a doctor is free to decide that the well-being of any woman, who genuinely wants an abortion, will be enhanced by it and damaged without it. Else she would not want the abortion. *A fortiori* every knowing, uncoerced abortion is for "health" reasons, whether it occur in the first, second or third trimester. Giving the states the power to protect fetal life after viability, subject to an exception "for the preservation of the health of the mother," gave them nothing.

But Missouri found a way to protect the viable fetus by prescribing a medical standard of care for the preservation of the aborted viable fetus' life and health. If other states followed the same course, with a bit more ingenuity, the empty concession in *Wade* might become a meaningful deterrent to abortion. Therefore, it was necessary not only to kill off the standard of care section in the Missouri statute, but also to begin a siege on viability.

3. *Colautti* v. *Franklin.*

The death knell for viability was sounded in *Colautti.* The court voided on "vagueness" grounds Pennsylvania's definition of viability and the state's prescribed standard of medical care for aborted

viable fetuses. The *coup de main* launched in *Danforth* ended in this *coup de grace* in *Colautti*:[26]

> As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all.

Notice what the court did to viability:

First: The "quality of *available* medical facilities" became a determining factor. Technologically, viability is no longer even a function of the current objective state of the life-sustaining art. It depends on the particular facilities in a particular hospital. Thus a particular fetus may be viable in every hospital in a state except the one hospital which is poorly equipped. If it is true that hospitals serving the poor are not as well-equipped as other hospitals, then statistically fewer fetuses of poor families will be viable (and within the range of whatever power is left to the states to protect viable fetuses) than fetuses of more affluent families. On the technological level, *Colautti's* redefinition of viability resulted (a) in endowing abortionists with a faculty to metamorphose a fetus from the viable to the non-viable by selecting an ill-equipped hospital in which to abort the fetus, and (b) in removing a number of fetuses of the poor from the law's protection.

Second: Medically, any objective concept of reasonableness in the viability determination was expunged from the law. "The number and the imprecision" of the factors mean that viability "can be determined only with difficulty," and different physicians use different standards. If this be so, then how, except in the goriest of circumstances,[27] could any abortionist's decision that a fetus is non-viable be effectively challenged? The court answers the question for us in another portion of the opinion. We are instructed that "Viability is reached when, in *the judgment of the attending physician on the particular facts of the case before him,* there is a reasonable

likelihood of the fetus' sustained [sic] survival outside the womb, with or without artificial support."[28]

The court did not act without reason when it killed off viability in *Colautti*. The majority discovered that not only were states continuing in their efforts to protect viable fetuses, but the protection was being extended to viable fetuses who were especially fit candidates for abortion (or, if you like, not fit candidates for birth). In a footnote the court remarked "Modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome (mongolism). Such testing, however, often cannot be completed until after 18-20 weeks' gestation."[29] If viability persisted in the law, an ingenious legislature might finally find a foolproof formula for forcing abortionists to preserve the life of aborted viable fetuses who are mentally or physically disadvantaged. But the purpose of abortion is to kill them precisely because they are disadvantaged. Viability, originally thought to be impotent, turned out to be vigorous, a proliferating protector of the burdensome. It had to go.

4. *Wade, Danforth and Colautti*: In Sum.

Viability has degenerated definitionally from a biological characteristic, giving a modicum of human value to the fetus (*Wade*), to a function of the current state of the technological and medical arts (*Danforth*), to a subjective non-norm, geared to the unavailability of life-sustaining equipment and the unchallengeable judgments of abortionists *(Colautti)*. Along with this geometric devaluation of the viable fetus has come a corollary diminution of the state's power of protecting it (or him or her). Was the devaluation undertaken in order to effect the diminution? Are definitions being re-defined in order to facilitate the killing and accomodate the killers? The questions are, of course, rhetorical.

Ironically, the court's destruction of viability razed *Wade*. If viability is not a biological characteristic of the fetus (as, in truth, it is not), but a function of technological/medical skill (as, in truth, it is); if viability is not intrinsic to the fetus (as, in truth, it is not), but an external achievement of science (as, in truth, it is); then viability is meaningless as a measure of the intrinsic worth of prenatal life (as, in truth, it is). An embryo of 30 days is as worthy as a fetus of 30 weeks (as, in truth, it, he or she is). The court may have intended, by its denigration of viability, to degrade the viable fetus; it succeeded

only in dignifying all the young in the uterus (as, in truth, they deserve to be). But, in truth, the killing goes on.

C. Manipulating Pre-Viable Life.

1. *Roe* v. *Wade*

Quite apart from viability, fetal life received short shrift in *Wade*. The majority gave only a passing nod to briefs of certain *amici curiae* which "outline at length and in detail the well-known facts of fetal development."[30] The opinion offers no evidence that the facts or their implications were given anything resembling serious consideration. The opinion does, on the other hand, teem with contradiction

First: The Court decided that in the abortion context the judiciary could not resolve "the difficult question of when human life begins," and Texas was not permitted to resolve it.[31] Then the Court decided that the unborn represents only "the potentiality of human life."[32] What the Court could not itself decide, and would not let Texas decide, the Court decided.

Second: The Court rejected conception as the beginning of human life because, *inter alia*, conception is "a 'process' over time, rather than an event."[33] Yet the Court in another portion of the opinion referred to, and accepted as a fact, "the normal 266-day human gestation period."[34] Some event must occur to get the whole thing started. The Court admonished the pregnant woman that she is not "isolated in her privacy. She carries an embryo and, later, a fetus. . . ."[35] Presumably these "young in the human uterus"[36] are different from a sperm and an egg. If we admit their existence, we must admit that their existence has already begun, and that it began at some time.

Third: To bolster its rejection of conception, the Court offered in evidence ". . . new medical techniques such as menstrual extraction, the 'morning after' pill, implantation of embryos, artificial insemination, and even artificial wombs."[27] The non sequiturs are monumental. Artificial insemination is a procedure for conceiving life. Implantation of embryos and artificial wombs are methods of sustaining the life of an embryo or fetus outside the mother's womb. (And don't these techniques, along with *in vetro* fertilization, suggest that prenatal life is viable from the beginning?) Menstrual extraction and the morning after pill are techniques for destroying life. In short every one of the "new medical techniques" assumes that life begins at conception.

As with viability, the facts of fetal life were manipulated to the detriment of the life of the fetus. The facts of life were used to prove non-life. Non-life may be killed with impunity.

2. *Beal* v. *Doe* and *Maher* v. *Roe*

In *Beal* and *Maher*, the Court held that neither the Social Security Act nor the Equal Protection Clause of the Fourteenth Amendment requires that a state fund nontherapeutic abortions through its medicaid program. The hard core majority broke up.

The crucial constitutional issue was whether the funding limitations were rationally related to a legitimate state interest (a constitutionally permissible purpose). The Court found that they were. "As we acknowledged in *Roe* v. *Wade*. . ., the State has a valid and important interest in encouraging childbirth. We expressly recognized in *Roe* the 'important and legitimate interest [of the state] in protecting the potentiality of human life.'"[38] Elsewhere, the Court affirmed the state's "strong interest" and "direct interest" in protecting the fetus,[39] and "the unquestionably strong and legitimate interest in encouraging normal childbirth."[40] The Court specifically sanctioned "the authority of the state to make *a value judgment* favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[41]

It is evident in *Beal* and *Maher* that the state interests in promoting childbirth and protecting the fetus are one and the same. If the former is "a value judgment" so is the latter, and it is a judgment that may be made "throughout the course of the women's pregnancy."[42] Also, it is a value judgment of the highest order: in upholding certain procedures in the Connecticut medicaid plans, the Court opined, "the simple answer to the argument that similiar requirements are not imposed for other medical procedure is that such procedures do not involve the termination of a potential human life."[43]

Would it not make sense for the Supreme Court to tell us at some time or another, why the state's interest in protecting fetal life at every stage of gestation ranks so high in the scale of values? And why this interest does not extend to protecting "potential human life" *from abortion* — even before viability? And why viability, which is the potentiality for human life outside the womb, somehow elevates the state interest in potential human life (which, at this point has become a potential potentiality) from the legitimate to the compelling?

How long can the Court avoid addressing and answering the fundamental question of fact: What is a fetus?

D. To Destroy Life

We have no reason to believe that the Supreme Court, as presently constituted, will ever concede the incontrovertible: that every successful abortion kills a live human being. The undisturbed "middle" of the court, which joined in acclaiming the value of fetal life in *Maher* and *Beal*, returned to the hard-core abortion majority in *Colautti*. It would appear that fetal life is valuable when we are asked to pay for its extermination, but valueless when we are asked to create a right to exterminate it. Killing will be tolerated, but innocence maintained by refusing to pay the killers. Worst of all, the very meaning of life will constantly be manipulated to "vindicate the right" of abortionists. All this will continue until somebody does something about it. The Supreme Court won't; the Congress must — by proposing a Human Life Amendment.[44]

The Congress' credibility is very much at stake. The Supreme Court may sequester itself; the Congress cannot. Remoteness is part of the veneer of the court. Responsiveness is the gloss of the Congress. The I-am-personally-opposed-to-abortion-but-will-not-impose-my-morality pretension does not wash as an excuse for opposing an amendment. The Congress does not impose a constitutional amendment; it proposes the amendment. Nor is the Congress a mere bystander to the court's stratagems. Quite the contrary. The Congress is a co-equal branch of government with a right and concomitant duty to check and balance the other branches. If that duty is not paramount when one of the other branches is manipulating life to destroy it, then Congress has either conceded its general impotence or declared its active partnership in the destruction. The Human Life Amendment languishes in the Congress, and a shibboleth for congressional intransigence gains currency. The court's veneer may survive; the Congress' gloss will not.

NOTES

1. *Colautti* v. *Franklin*, 99 S. Ct. 675, 689 (1979) (White, J., dissenting with Burger, C. J. and Rehnquist, J.)
2. John T. Noonan, Jr., *A Private Choice* (New York: The Free Press, a division of Macmillan, 1979), pp. 33-46.
3. See Byrn, "Which Way for Judicial Imperialism?," *The Human Life Review*, Vol. III, no. 4, Fall 1977, pp. 19, 29.
4. *Beal* v. *Doe*, 97 S. Ct. 2366 (1977); *Maher* v. *Roe*. 97 S. Ct. 2376 (1977); *Poelker* v. *Doe*, 97 S. Ct.

2391 (1977). At this writing, the funding issue is again before the court. *Williams* v. *Zbaraz*, 100 S. Ct. 477 (1979).

5. *Roe* v. *Wade*, 93 S. Ct. 705, 733 (1973).

6. *Doe* v. *Bolton*, 93 S. Ct. 739, 747 (1973).

7. *Roe* v. *Wade*, 93 S. Ct. 705, 733 (1973).

8. 96 S. Ct. 2831 (1976). Danforth also presented issues of parental and spousal consent. Parental consent was also at issue in *Bellotti* v. *Baird*, 96 S. Ct. 2857 (1976), 99 S. Ct. 3035 (1979). The related issue of parental notification is presently before the Court. The New York *Times*, Feb. 26, 1980, D 19.

9. 96 S. Ct. at 2845.

10. *Id.* at 2847. A similar "standard of care" provision was struck down in *Colautti* v. *Franklin*, 99 S. Ct. 675 (1979).

11. *Id.* at 2855.

12. 93 S. Ct. at 730.

13. *Id.* at 730.

14. *Id.* at 727.

15. *Id.* at 731.

16. *Id.* at 732.

17. *Id.* at 730, 732.

18. *Planned Parenthood* v. *Danforth*, 96 S. Ct. 2831, 2839 (1976).

19. *Id.* at 2837, 2838-39.

20. *Id.* at 2850. (Emphasis added.)

21. *Roe* v. *Wade*, 93 S. Ct. 703, 732 (1973).

22. *Id.* at 733.

23. *Doe* v. *Bolton*, 93 S. Ct. 739, 747 (1973).

24. *Id.* at 747.

25. *Id.* at 747.

26. *Colautti* v. *Franklin*, 99 S. Ct. 675, 686 (1979).

27. See, e.g., *Floyd* v. *Anders*, 404 F. Supp. 535 (D. So. Car. 1977), vacated and remanded 99 S. Ct. 1200 (1979) in which the aborted "fetus" lived for 20 days after the abortion. The case is discussed in Noonan, *supra* note 2, at 137-52.

28. *Id.* at 682. (Emphasis added.)

29. *Id.* at 682 n. 8.

30. *Roe* v. *Wade*, 93 S. Ct. 705, 728 (1973).

31. *Id.* at 730, 731.

32. *Id.* at 731.

33. *Id.* at 731.

34. *Id.* at 713.

35. *Id.* at 730.

36. *Id.* at 730.

37. *Id.* at 731.

38. *Beal* v. *Doe*, 97 S. Ct. 2366, 2371 (1977).

39. *Maher* v. *Roe*, 97 S. Ct. 2376, 2385 (1977).

40. 97 S. Ct. at 2372.

41. 97 S. Ct at 2382. (Emphasis added.)

42. 97 S. Ct. at 2372.

43. 97 S. Ct. at 2386.

44. On my preference for a Human Life Amendment, see "A Human Life Amendment: What Would it Mean?" *The Human Life Review*, Vol. I, no. 2, Spring 1975, p. 50.

APPENDIX A

[*Professor Raoul Berger is one of the best-known legal scholars in America. His book* Government by Judiciary: The Transformation of the Fourteenth Amendment *(Cambridge: Harvard University Press, 1977) was one of the most controversial ever written on the Supreme Court. Joseph Sobran, reviewing the book for* National Review *(March 3, 1978) summarized Berger's position as being in agreement with most of what the Court has* done, *but objecting to its* means, *which were "legislative" rather than judicial. In this article (first published in the same* National Review, *April 4, 1980) Mr. Berger returns to the same theme while commenting on another recent book on the Court. (Reprinted with permission;* © National Review, *Inc., 1980)*]

Judicial Government vs. Self-Government

by Raoul Berger

Woodward & Armstrong's behind-the-scenes glimpses, in *The Brethren*, of the Justices at work have led some to deplore the impairing of the Supreme Court's influence, which recalls to mind similar invocations of the "mystique" of the Presidency against those who sought to air Richard Nixon's derelictions. So what, it is urged, if the Justices are "ordinary men": after all, they are no more fumbling than any other committee. But as John Leonard acutely remarked, this particular committee votes "on how the rest of us would be obliged to behave when it comes to abortion, busing, . . . pornography," and — it may be added — affirmative action, death penalties, and the like. It is a committee that has taken the deciding of momentous national issues out of the hands of the people. Their fitness for the task — to act, as some enthusiasts urge, as the "national conscience" — is thus of the utmost importance. Not that Woodward & Armstrong's disclosure that the Justices decide on the basis of personal predilections rather than constitutional demands need rest on backstairs gossip.

At the height of the Court-packing crisis in 1937, Professor Felix Frankfurter wrote to President Franklin Roosevelt: "People have been taught to believe that when the Supreme Court speaks, it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution. . . . that is what the country needs most to understand." Today, activist academicians acclaim "the Court's new and grander conception" of its role, the "assertion of power to *revise* the Constitution, bypassing the cumbersome procedure prescribed by Article V of the Constitution." *Nowhere* are the Justices given authority to "bypass" that procedure, which reserves to the people the exclusive right to amend the Constitution.

When, therefore, Chief Justice Burger's confrere allegedly was "astonished" by his remark, "We can do what we want," he was oblivious of Charles Evans Hughes's earlier incautious "The Constitution is what the Supreme Court says it is."

The Fifteenth and Nineteenth Amendments, which conferred suffrage on blacks and women, argued to the contrary, because control of suffrage had, from the beginning up to that point, been left to the States. The Court cannot confer by decree what the people judged required an amendment. True, that does not satisfy Chief Justice Warren's test: Is it "good," is it "right"? But Chief Justice Marshall long since held, and the Framers had earlier recorded, that a result's being desirable does not mean that it is required by the Constitution. And Justice Holmes warned against confusing law and morals. There are wide differences over what is moral — as witness the current abortion controversy.

The idiosyncratic nature of such decision-making is illustrated by Justice Hugo Black's insistence on immediate desegregation while allegedly resisting busing with the query, "Where does the word *busing* appear in the Constitution?" With equal justice one may ask: Where do the words "desegregation" or "reapportionment" of state voting patterns appear there? Indeed, the framers of the Fourteenth Amendment, on which the Court rested the "desegregation" and "reapportionment" decisions, unmistakably *excluded* suffrage and segregation from the scope of the Amendment, thus putting both beyond the Court's reach. If that be demonstrable, then the Court is guilty of a continuing usurpation of power — in forcing busing, for example, down the throat of an unwilling people. One is reminded of what Crane Brinton wrote of Robespierre: "If Frenchmen would not be free and virtuous voluntarily, then he would force them to be free and cram virtue down their throats."

Even activist scholars increasingly agree that suffrage and segregation were excluded from the Fourteenth Amendment. A few confirmatory facts must suffice. Seventeen Northern states, Justice Brennan recounted, had rejected black suffrage between 1865 and 1868. Hence, Senator Jacob Howard, who explained the Amendment to the 39th Congress on behalf of the Joint Committee on Reconstruction, said, "three-fourths of the States could not be induced to grant the right of suffrage even in any degree." The Committee Report — such reports are held to be the best evidence of legislative intention — stated, "the States would not surrender a power they had exercised, and to which they were attached," and therefore the Committee left control "with the people of each State," as in fact Paragraph 2 of the Amendment explicitly provides. The Court's "one person/one vote" therefore reversed the "irrefutable" intention of the Framers to withhold federal jurisdiction of suffrage, leading Justice Harlan, in dissent, justly to declare, "When the Court disregards the express intent

and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."

Thus the Court has not merely been acting as a "legislature" rather than a court, as George Will has noted, but even worse, it is acting as a continuing constitutional convention, usurping a function reserved to the people. Were the people to become aware that the Court is *imposing its own values* on them, as activists unabashedly acknowledge, they would insist on deciding their own destiny. Be it supposed, Woodward & Armstrong notwithstanding, that the Justices are not just "ordinary men," that they are better fitted than the people to govern — even then, "government by a self-designated [and irremovable] elite," said an activist luminary, "is not the American way." Like Judge Learned Hand, the people do not want to be governed by "nine Platonic Guardians"; and no such power was conferred. That is the basic issue that needs to be spotlighted.

APPENDIX B

[*The following discussion of the role of the Supreme Court is reprinted (with permission) from the transcript of William F. Buckley, Jr.'s "Firing Line" TV program, which was taped in New York City on January 3, 1980, and originally telecast by the Public Broadcasting System on February 10, 1980. "Firing Line" is a production of the Southern Educational Communications Association of Columbia, So. Carolina, and is produced by Mr. Warren Steibel.*]

How Active a Supreme Court?

MR. BUCKLEY: The appearance of a book purporting to reveal the goings-on within the Supreme Court raises many questions, prominent among them that the Supreme Court has evolved into a kind of creative body designed to bend the law in the right direction and put it down as constitutional exegesis. This posture by the court pleases the so-called activists, displeases the strict constructionists, a representative of both schools we have here today.

Bruce James Ennis, Jr. was born in Knoxville, Tennessee, graduated from Dartmouth College and the Chicago Law School. He practiced law, specializing in trial and appellate litigation, and in due course found himself associated full-time with the American Civil Liberties Union which he new serves. Mr. Ennis considers that Supreme Court decisions are "good" or "bad" according as they further or retard those objectives with which he is in sympathy.

Robert H. Bork is professor of law at Yale University, and also a graduate of the University of Chicago Law School. He went early to teaching law, but interrupted his academic career to serve turbulent years in Washington. He went there as solicitor general, and before he knew it, he was acting attorney general. This happened, you may remember, when poor Mr. Nixon couldn't find anyone who would agree to fire Archibald Cox, who was heading up the Watergate investigation. So President Nixon started firing people who wouldn't fire Cox, until he found Mr. Bork who acknowledged the right of the president to fire his own appointees, a point dramatically made by the late President Andrew Johnson. Mr. Bork is a constitutional scholar who has been critical of tendencies in the Court.

Our examiner will be Mrs. Harriet Pilpel, about whom more in due course.

I should like to begin by asking Mr. Ennis why he is critical of the decision of the Supreme Court in the case of *Ambach* v. *Norwick*?

MR. ENNIS: It's interesting you should start with that case, because that was a case I argued in the United States Supreme Court. I was critical of the decision in that case, in which the Supreme Court ruled that New York

State could prohibit permanent resident aliens from being teachers in New York City's public schools. I was critical of the decision for several reasons. You have to know a lot about the facts in the case in order for it to become compelling.

MR. BUCKLEY: Yes, I wanted to know about the Constitution.

MR. ENNIS: The Constitution says that . . .

MR. BUCKLEY: Presumably New York can do anything it wants to do that isn't unconstitutional, right?

MR. ENNIS: That's right. This is a constitutional case. The Constitution says that no person can be denied equal protection of the laws and that the word "person" in the Constitution has been interpreted by the Supreme Court to mean just that. It means "person" not "*citizen.*" There's a long line of Supreme Court decisions to that effect. In other Supreme Court decisions, the Supreme Court had ruled that states could not prohibit permanent resident aliens from being lawyers, and I thought that *stare decisis* the principle of following previous decisions of the Supreme Court — would suggest that if non-citizens can be lawyers, non-citizens ought to be able to be public school teachers, at least in a state such as New York where the state expressly permits non-citizens to be teachers in the private schools, which reach approximately 16 to 20 percent of all the students in New York State.

MR. BUCKLEY: In other words, you consider it a violation of due process for a state to grant privileges to citizens that it does not grant to non-citizens? How about the right to vote?

MR. ENNIS: No, not a violation of due process, but a violation of equal protection unless the state has what the Supreme Court has described as a compelling justification for treating non-citizens different from citizens.

MR. BUCKLEY: Well, let me ask Mr. Bork whether he considers this — not by any means the most spectacular case that divides activists from conservatives — but one that does in fact divide them, or is there something elusive in the language that suggests that Mr. Ennis' objections to the majority ruling are persuasive?

MR. BORK: Well, it is a case that divides us, and primarily I think because the equal protection clause which we're dealing with here was intended to be a clause about race and once you extend it beyond equality between the races you in effect give the courts ability to extend the clause to any group they wish to extend it to and to enforce their current moral or political views. And that's what indeed they've been doing in this area.

MR. BUCKLEY: Well, they've been doing it for how long? A generation? It antedates the Warren Court, doesn't it?

MR. BORK: It does. It does.

MR. BUCKLEY: Now . . .

MR. BORK: The objection to it was the same then.

MR. BUCKLEY: Well, the majority in its ruling did what? Did it seek to retrieve the more limited meaning of the equal protection clause?

MR. BORK: In part. This Court is less adventurous and more restrictive about the equal protection clause than the Warren Court was, and in part it's beginning to have some doubts about its adventures in that area. But it's important to say that the idea of equality is an unrestrained idea, and if you give a court power to say when equality must be provided to various groups, you have given the court power over all law, because all law draws distinctions and creates inequalities.

MR. BUCKLEY: You've given us sort of a Procrustean mandate.

MR. BORK: Yes.

MR. BUCKLEY: And therefore any — In other words, the fact that there is inequality is not a matter of constitutional concern. Quite the contrary. The Constitution guarantees the right for one person to surpass another person in his achievements. Some people get to Chicago Law School. Some people don't. Right?

MR. ENNIS: Equality of opportunity, that's correct. Could I say something about what I see as the underlying tension in the dispute between us here . .

MR. BUCKLEY: Yes.

MR. ENNIS:. . . which may not be as much of a dispute as it might at first seem. There's a continuing tension between the Constitution and democratic government. If we were a pure democracy, then the legislative will — the will of the majority of a population — ought to control on all issues. But we're not a pure democracy. We are a constitutional democracy, which means that there are certain very fundamental principles which we call constitutional principles, which even the majority of the population cannot overturn or suppress. And it was decided at the time of the founding of this nation that the legislative branch would represent the majority will — could be fairly expected to represent majority sentiment — but that it would be the duty of the judicial branch to protect the legitimate constitutional rights of individuals and minorities when the majority was indifferent to those individual and minority rights. That in fact is described in great detail in the Federalist papers by Hamilton, Madison and Jay — that it was the duty of the courts to protect individual rights from what they called the tyranny of the majority.

MR. BUCKLEY: Well, that's interesting, because that was before the Bill of

Rights was written.

MR. ENNIS: That's right. It was before the Bill of Rights was written. It was even before the Constitution itself was adopted. But in the Federalist papers themselves, there is a long discussion of judicial activism, and the point that comes through that is that the court is not engaged in social engineering. The court is doing exactly what it is supposed to do when it actively protects the rights of individuals and minorities when those are constitutional rights.

MR. BUCKLEY: Well, what you're saying is that the court is doing what it is supposed to do when it does what it is supposed to do.

MR. ENNIS: Well, let me — No. no. There's an important difference there. I would agree with Mr. Bork that if we're not talking about constitutional values — if the court is simply substituting its judgment for what should be wise policy for the legislative judgment that is impermissible activism . . .

MR. BUCKLEY: Like Bakke?

MR. ENNIS:. . . on the part of the court.

MR. BUCKLEY: Like Bakke?

MR. ENNIS: No, I don't think in Bakke they did that. In Bakke the Supreme Court interpreted a congressional statute. If Congress disagrees with the Supreme Court's interpretation of that statute, Congress is entirely free to amend the statute to make clear the disagreement, and then the congressional interpretation of the statute would control . . .

MR. BORK: Five of the justices in Bakke, as a matter of fact, put it on constitutional grounds . . .

MR. ENNIS: Well, I think . . .

MR. BORK:. . . so that . . .

MR. ENNIS:. . . four did. Four did.

MR. BORK: Mr. Powell— Mr. Justice Powell — did, too. Let me pick up this point because I think it's an important one. It's quite right, we live in a constitutional democracy, and the court is intended from the beginning to interpret the Constitution so as to deny the power of majorities to take away individual rights. The question then becomes whether the court can go further and make up individual rights, and I think that is the disagreement between activists and the rest of us. I think that this Court and the Warren Court and indeed prior courts have made up the Constitution in large part, which is not the function assigned to them by the Federalist papers or by the framers of the Constitution.

MR. BUCKLEY: Well, let's turn to Bakke since it is a case with which a lot of

people are familiar along with Weber. You wrote after your analysis of the Bakke decision, Professor Bork, "The thrust of Bakke therefore is towards proportional representation as social morality." Would you explain what you meant by that?

MR. BORK: The Court in Bakke — and there are three opinions, at least, so that to speak of "the Court" is a little bit of a fiction — but the main thrust of the opinion is that groups should be represented proportionally . . .

MR. BUCKLEY: May be.

MR. BORK: Not only may be, but may constitutionally be represented proportionally in various areas of life, in that case in a medical school, and that that is the — if not the constitutional mandate, it at least allows discrimination among races to achieve proportional representation.

MR. BUCKLEY: Well, as I understand your analysis, what you're saying is that the Bakke decision puts a burden on someone who says "no" to a WASP and "yes" to a Hispanic of showing that that is not the exclusive criteria by which he was governed in deciding no in the one case and yes in the other. Now you point out the complication that in a school, you might say, "Well, we want a football player, and we want somebody from Alaska for cultural reasons of mix," but that as you go upward in the professional schools it becomes more difficult to apply those criteria in that the intellectual underpinnings of Bakke all of a sudden disappear. Am I — Is this correct?

MR. BORK: Except in one respect, Mr. Buckley. I think the intellectual underpinnings disappear at a much earlier level. (laughter)

MR. BUCKLEY: To which your comment is what?

MR. ENNIS: Well I think perhaps that could be illustrated best by the other case you mentioned . . .

MR. BUCKLEY: The Weber.

MR. ENNIS:. . . the Weber case. In the Weber case the Supreme Court ruled that private corporations and labor unions in those corporations could voluntarily get together and agree on affirmative action plans to ensure that black workers in those corporations would get the training necessary to qualify for higher jobs in those corporations.

MR. BUCKLEY: Notwithstanding Title VII of 1964?

MR. ENNIS: Notwithstanding Title VII. That's correct. The other side in that case took the position that Title VII, the statute that prohibits discrimination on the basis of race in employment, prohibited those kinds of voluntary affirmative action plans. The Supreme Court interpreted Title VII to say that it does not prohibit that kind of benign affirmative action

plan. Now, if that interpretation of the statute is really not what Congress intended, Congress can change the statute, as it did after the Gilbert case, when the Supreme Court interpreted the same statute to say that discrimination on the basis of pregnancy is okay. Congress then amended Title VII to make it clear that discrimination on the basis of pregnancy does violate Title VII. The difference here is when the Supreme Court is only interpreting a statute, Congress has the full power to overrule the Supreme Court.

MR. BORK: That's not entirely true, and I think it ought to be said that when Congress, against the plain text of the Civil Rights Act, which prohibits racial discrimination, and against the plain legislative history of the Civil Rights Act, which says that's not what is intended, nevertheless goes on to hold that discrimination is proper as long as it is in favor of a favored minority and against a majority. It is not easy to overturn that. You have now added a new political equation — the moral force of the Court — and it's very difficult for Congress to regroup and to overturn that kind of a decision.

MR. ENNIS: I didn't mean to suggest that it's an easy process, but certainly if a Supreme Court decision really violates the majority will in terms of interpretation of a statute, the majority will can impose itself. It's a little more difficult when a Supreme Court decision is based on the Supreme Court's view of what the Constitution requires, because the legislature cannot revise the Supreme Court's interpretation of the Constitution. The only remedy there is to amend the Constitution, but on four occasions in our history the Supreme Court has made constitutional decisions which were so against the sentiment of the country that the Constitution was amended on those four occasions to overturn those Supreme Court decision.

MR. BUCKLEY: Three of them were in the nineteenth century, and the fourth in the twentieth century was on its way out — that is to say, the resistance to the progressive income taxation was dying of attrition. So I don't think it's a very good example. I think another formulation is: Not in our time or in our parents' time have we seen the people of the United States rise up and reverse the Supreme Court of the United States because of the ultramontanism of the . . .

MR. ENNIS: Well, what about the 26th Amendment?

MR. BUCKLEY:. . . of the community. What about the 26th Amendment?

MR. ENNIS: I think that's another example of the people rising up to reverse a decision of the Supreme Court on the voting age — whether Congress could specify voting age for states — I think in *Oregon* v. *Mitchell*, and then there was the 26th Amendment to overrule that decision. That was a recent — in our time — I don't mean to suggest that it's an easy or

occasional thing for a constitutional amendment to reverse Supreme Court decisions.

MR. BUCKLEY: I'm glad you brought that up because I would like now to quote from an interview given last summer by Justice Lewis Powell to Professor Harry Clor in Antioch, in which the subject arose of the voting age for — of the constitutional voting age — and Professor Clor said, "Do you think that judicial statesmanship, to the extent that there is such a thing, consists primarily of insight into the needs or demands of the time, or into the changing conditions to which constitutional clauses could be applied?" To which he replied first of all with reference to *Brown* v. *Board of Education*, and then Chief Justice Powell went on to say, "It was also the Supreme Court that made the difficult decision — one the Congress apparently did not want to make — to lower the voting age to 18. There was nothing in the Constitution that could have suggested that result. In the simplest of terms, the Court decided that when young people were being drafted and asked to go to war and risk their lives at age 18, the time had come to extend to them the right to participate as citizens in the decisions that affected them so seriously." Now, in the first place, you presume he forgot that the 26th Amendment had been passed. Right? But in the second place, isn't this a most extraordinary confession of what it is that dictates at least the decisions of one man who on taking office swore to defend the Constitution, not his transcendent idea of what the Constitution ought to say if we had a socially vibrant Congress?

MR. ENNIS: I think you're right about that. I'm aware of that quote, and I think anyone who reads or has read *The Brethren* would have to agree that the current Supreme Court almost certainly like all previous Supreme Courts before it, is a very result-oriented court. I think that's unfortunate. My view is, as you mentioned at the beginning of the program, that I agree with the Supreme Court decisions when I think they're right and not when I think they're wrong, of course there's some of that — but I think that the Supreme Court is abdicating its responsibility in our system of checks and balances when it does not pay sufficient attention to the constitutional rights of individuals and minorities and pays too much attention to the majority will.

MR. BUCKLEY: Well, don't we have here, Mr. Bork, the following difficulty: that if you permit yourself to use language as loosely as the Supreme Court uses language, you can say almost in any circumstances that you're making a constitutional point. You've got in the 1964 Title VII act a language that is so clear that if you hired — as indeed professional draftsmen were hired to make it clear — you could not make it clearer. Unless as somebody suggested, we go back and do it again and say, "This time we mean it." It said that nobody shall be given preference on account of race.

MR. BORK: The Supreme Court has clearly decided that it is the major reform agency in the area of race, and it is reforming in what it regards as a desirable direction the law with respect to race regardless of what the statutes say, and, indeed, regardless of what the Constitution says.

MR. BUCKLEY: Why are you lawyers permitting this, or is it because of the ideologization of the legal profession?

MR. BORK: Well, a lot of lawyers, it must be said, and most law professors, really think in terms of results, and they really think in terms of what I would define as a left liberal ideology which they want the Court to follow. And indeed it must be said that I think the Burger Court is slightly to the left of the American public. The Warren Court was well to the left of the American public. But the current Court is not a conservative court. The Chief Justice may be conservative, but the Court as a whole is not. And I think a couple of things contribute to that. One is, the Court is perceived through the media. The media, by and large, are manned by people who are somewhat left of center. And it is also represented to others by the academic legal profession, and the law professors tend to be to the left of center. So that you haven't got an articulate body of professional opinion that goes after the Court when it behaves in this activist fashion.

MR. BUCKLEY: Well, is this a threat to constitutional government?

MR. BORK: It is indeed. It's a threat to representative democracy, and indeed, it should be said, that there was a Court prior to the mid-1930s when the New Deal attacked it which tended to uphold in an equally lawless fashion the values of business and of conservatives. That Court was defeated politically. It has been replaced by a Court now which responds to the media and to the intellectual classes. I see no prospects that that Court will be defeated politically.

MR. BUCKLEY: Well, is it, in your judgment, politically possible nowadays to reject, i.e., to overrule, the Supreme Court on a matter that seems to incorporate an ethical judgment, or have we a situation in which the American public looks to the Court as, in effect, an ethical tribunal?

MR. BORK: I think it has come to look at the Court as an ethical tribunal, and, in part, a large part of the public still believes that the Court is getting its results out of the Constitution, and they think of the Constitution as a sacred document. And the Court is very careful to say that these results come from the Constitution. It is not the Court's will. So that it becomes politically, I think, virtually impossible to reverse the Court. For example, the abortion decision — the original one — has absolutely no foundation in any constitutional text or intent, but it will prove impossible to overturn it.

MR. BUCKLEY: Well, what does this say to you, Mr. Ennis, about what the

Federalist papers had in mind? Presumably, the — Well, we all know that the people who wrote the Federalist papers assumed a self-governing republic. It is, of course, not a self-governing republic if, for all intents and purposes, an unimpeachable Supreme Court makes these grand provisions of such momentous ethical consequences — for instance, *Roe* v. *Wade*.

MR. ENNIS: That's right. There is a lot of discussion in the Federalist papers of exactly that point. The problem, of course, is that the Constitution is not like statutory law. Statutory law is generally very specific. The Constitution speaks in terms of very broad principles like equal protection or due process or free speech, and it is the responsibility of the Supreme Court to give meaning to those very broad principles, and the area of disagreement is whether the Supreme Court has correctly or incorrectly applied those broad principles to the facts of the cases before it. In the Federalist papers, they say that whenever the Supreme Court gives an interpretation to those broad principles that violates the manifest tenor of the Constitution, that would be an impermissible act by the judiciary, but as Hamilton put it, there is not much to worry about on that score because the judiciary is, as he said, the least dangerous branch. It does not have the power to appropriate money, to compel by force that its decisions be obeyed; and it can always be reversed through the constitutional amending process.

MR. BUCKLEY: Except isn't discipline in this field — Hasn't it now reached a point where it would be inconceivable for a President of the United States to say what Andrew Jackson did: "The Supreme Court has made its decision. Now let it enforce it." If Richard Nixon had said that he would have been thrown out even earlier than he . . .

MR. ENNIS: Well, he came very close to saying that when he announced in the tapes case that he announced in advance that he would not obey any decision of the Supreme Court on the point unless it was a definitive . . .

MR. BORK: I don't think he said that.

MR. BUCKLEY: Yes. All right. What did he say?

MR. BORK: He said: "I will obey a definitive decision."

MR. ENNIS: A definitive decision.

MR. BORK: And I think it was clear that if Nixon had not obeyed that decision, he would have been impeached overnight, and the moral force of the Court is now such that Hamilton's description of it is no longer accurate. I don't think a president dares not enforce its decisions, and beyond that, Hamilton said it can't appropriate money — some of the lower courts have begun to order states to appropriate money for causes they think good.

MR. ENNIS: Well, I'm aware of some of those decisions. I've been involved

personally in a lot of the decisions involving mental hospitals. The ones I'm aware of, the courts have not ordered the states to appropriate money. What they have said is: So long as you choose to operate a state school for the retarded or a hospital for the mentally ill, it must meet certain minimum constitutional standards of decency, and if that costs money, you have to appropriate the money to do it . . .

MR. BUCKLEY: What constitutes standards of decency?

MR. ENNIS: Well, for example, at Willowbrook State School for the Retarded, a case in which I was a lawyer, we went to Willowbrook and found mentally retarded children confined to solitary seclusion rooms for periods of up to 11 years continuously with no bedding, no furniture, no radio, no toilet, no water, nothing in the room but a vinyl mat.

MR. BUCKLEY: You understand that I'm not in favor of that, I hope.

MR. ENNIS: No, I understand.

MR. BUCKLEY: But permit me to ask where the constitutional standards of decency reside in the Constitution that you know so well.

MR. ENNIS: Well, the peg for those decisions is the constitutional right to liberty. If someone is being deprived of liberty on the ostensible ground that they need treatment, then if the state fails to provide the promised treatment . . .

MR. BUCKLEY: No, no. Wait a minute.

MR. ENNIS: The justification for the deprivation of liberty disappears.

MR. BUCKLEY: They weren't deprived of liberty because they needed treatment. They were deprived of liberty because they did not conform to the rules of society — to the law. Isn't that correct?

MR. ENNIS: No, no. These were — Most of the people who entered Willowbrook entered Willowbrook as children. They were not violating any laws. They needed special attention and care because of their condition. They needed treatment. For the retarded, it's known as habilitation; for the mentally ill, it's known as treatment. But they were placed there under statutes which promised that kind of care and attention, and they did not get it. We found children — I found a child in the medical surgical unit of Willowbrook who had maggots in his legs under a cast, because no one had bothered to take him to a toilet for over two weeks. We took that child to a public hospital, and he died a few days later. The official diagnosis was dehydration. No one bothered to give him water.

MR. BUCKLEY: But now why is that a constitutional — I mean I think it's outrageous, and I'd be in favor of impeaching everybody in sight who had anything to do with the atrocity, but I just don't see how it relates to the

Constitution of the United States, or am I missing something?

MR. BORK: No, I don't think you're missing anything. I think one of the things the ACLU might have done if they were interested in that was try to enforce the statutes which make these promises rather than try to work into the Constitution a constitutional right to therapy which I think is impossible to find.

MR. ENNIS: Well, let me be clear about it. I argued in the Supreme Court the case of *Donaldson* v. *O'Connor*, the first major so-called "right to treatment" case, and we never argued that there was an affirmative obligation on the state to provide treatment. What we said was when the state involuntarily deprives a person of liberty for the ostensible purpose of treatment, then the state must either provide the treatment that is promised or must restore the person to liberty. This is a person, after all, who has not violated any criminal law and who cannot be deprived of liberty under the criminal law.

MR. BORK: Mr. Ennis, you mean then that if the state simply said, "These people cannot take care of themselves, so we will put them someplace where they can be kept from harming themselves or others," that there would be no constitutional problem involved? That would be enough?

MR. ENNIS: I do mean this, that we took the position in all of those cases that if the state chooses to get out of the business of running hospitals for the mentally ill and schools for the mentally retarded, there is no constitutional obligation on the state to get back in the business.

MR. BORK: But you're avoiding a point, which is that: Suppose the state doesn't promise therapy, just says that these people must be taken off the street. Is there a constitutional right to therapy in those cases?

MR. ENNIS: Well, the Supreme Court in the Donaldson case ruled even if the state had not promised therapy, that when you're talking about a non-dangerous person who is deprived of liberty, not because they violated any criminal law, but solely because they are mentally ill, the Supreme Court ruled that the only legitimate purpose of deprivation of liberty in those circumstances is to provide treatment whether the state promises . . .

MR. BORK: That was a person who was no danger to himself or others. I'm talking about people who are — who can't take care of themselves.

MR. ENNIS: People who are dangerous to themselves or others is a situation that has not yet been resolved by the Supreme Court . . .

MR. BORK: Well, I was trying to get your constitutional view, not the Supreme Court's.

MR. ENNIS: Well, unfortunately, my constitutional view is a rather, I think,

conservative view, and that is if there is a legitimate basis for depriving a person of liberty — if that person has violated the criminal law — then I think the person can be deprived of liberty for violating the criminal law. The difference there, though, is, under the criminal law there would almost always be a definite time limit on the period of confinement, but in mental hospitals people are committed indefinitely, often for life. Once you're in a mental hospital, you're more likely to leave in a coffin than on your own two feet.

MR. BORK: Well now, but I've asked you the question twice, and you keep talking about crime or something else, and I guess I won't ask it again.

MR. ENNIS: I'm sorry. I thought I'd answered it.

MR. BUCKLEY: Well, let's move into one or two other areas under contention. In your list of good and bad decisions for the *Nation* magazine, you singled out several others for criticism; one of them is the DePasquale case, about which, by the way, I'm ambivalent, but I'm interested in the constitutional point. As I understand it, the Constitution says that the defendant is entitled to a public trial. As I understand the decision, it says that if the defendant waives that right he has a right and there is no third party interest in observing the mechanisms of that trial. Now I, as a journalist, would feel very much put out if I were turned back at the door, but if I were turned back at the door at the request of the defendant I would superordinate his right to privacy over mine to review the proceedings. For instance, it may very well be that he is extremely confident of his own innocence, but in the course of establishing it he will have to show that he has taken certain positions or undergone certain experiences that are prejudicial to his future. Will you explain to me why you consider that a clear constitutional violation?

MR. ENNIS: Well first, the American Civil Liberties Union has not taken the position that in those cases the press always wins and the defendant always loses. Quite the contrary. Our position . . .

MR. BUCKLEY: Speaking for the ACLU or for yourself now?

MR. ENNIS: Speaking for the ACLU. Our official policy in those matters is that if there is a conflict between the press' right to attend a trial and the defendant's right to a fair trial, and if there are no less drastic alternatives .

MR. BUCKLEY: No, no. I didn't say fair. I'm saying it is his subjective determination — he doesn't want anybody else there — I quote you: "The effect of this decision is to shield judges from criticism and will be destructive of informed decision-making about the criminal justice system where reform is badly needed."

MR. ENNIS: That's so. I do believe that. I think if the Gannett case had been

the law at the time of Watergate that the defendants in Watergate could have, at their sole discretion, excluded the press from the courtroom during the plea bargaining before Judge Sirica. The press and the public would never have even learned . . .

MR. BUCKLEY: No. No.

MR. ENNIS:. . . that there might have been higher-ups involved and Watergate might never have been unraveled.

MR. BUCKLEY: No. I think if I'd been at Versailles there would have been no Hitler. So what?

MR. ENNIS: I'm sorry. I didn't understand.

MR. BUCKLEY: Well, I mean the fact that a particular presence might have changed historical circumstances is not retroactive validation for the institutionalization of someone's right to be present.

MR. ENNIS: No, it's not a basis for institutionalization, but it is an example of the kinds of things that can happen if the press is routinely excluded from courtrooms . . .

MR. BUCKLEY: Okay. So you don't like it, but I'm asking you to argue the constitutional case, or do you find it difficult to do so?

MR. ENNIS: No. I'm happy to argue the constitutional case.

MR. BUCKLEY: Is this a . . .

MR. BORK: I think Mr. Ennis is making a First Amendment case and not a defendant's right case.

MR. ENNIS: That's right.

MR. BORK: He is really saying that there is, in addition to the defendant's right, there is a public right coming through the First Amendment to view the criminal process in operation.

MR. BUCKLEY: Do you see that right?

MR. BORK: That, it seems to me, is an arguable case, and I don't . . .

MR. BUCKLEY: It's not a neat one?

MR. BORK: It's not a neat one.

MR. BUCKLEY: Okay. Let's get a neater one. What about *Branzburg* v. *Hays*. Do you consider that a — I'm asking this of Mr. Bork. *Blanzburg* v. *Hays* is the decision, you will remember, in which the Supreme Court said that a journalist does not have any absolute right to refuse to identify his sources where the court considers that the identification of those sources is relevant to procedure.

MR. BORK: The Court seems to be quite correct there.

MR. BUCKLEY: Now this is the one that you criticized, is it not, Mr. Ennis, on constitutional grounds?

MR. ENNIS: I think the Branzburg decision is wrong. I think, though you might be surprised to learn it, that the Farber decision was closer to being correct. I think than when a criminal defendant really needs to find a reporter's source in order to present a criminal defense, I think the criminal defendant ought to have the right to get that information. But Branzburg was not a criminal defendant getting information to defend against a prosecution. Branzburg was a case of a grand jury getting information. I think it's a difference when governmental agencies and instrumentalities are attempting to obtain reporters' sources that when a criminal defendant who doesn't, obviously, choose to be a criminal defendant and needs those sources to defend a criminal prosecution.

MR. BUCKLEY: Okay. Let me take a step forward, Mr. Bork, and ask you a question now that is almost nostalgic in that it awakens the spirit of 10 years ago when everybody was talking about civil disobedience. When the Supreme Court in its unhappiest moment declared that black people were property, a lot of people stood up and said that they would simply refuse to respect the law. As a matter of fact, during the period of Thoreau and Emerson there was even some such sentiment about paying taxes for the Mexican War. Now, is there a point at which you believe there is a right to pass to civil resistance on the grounds that there is clear usurpation by the Supreme Court of authority not vested in it by the Constitution of the United States?

MR. BORK: I think there's generally a right to pass to civil disobedience against any branch of government when it has gone well beyond any conceivable legitimate authority that it has. I think I would place that point pretty far out — that is, it would have to be an extraordinarily clear case, and not only that, but one in which a great deal was at stake, not just even disagreement with what they do. Civil disobedience ought to be the absolutely last resort and reserved for the most extraordinary cases.

MR. BUCKLEY: Well, that means that you are more permissive than those who were arguing seven or eight years ago that there is never an excuse for civil disobedience in a society that has the formal mechanisms of reform at its disposal.

MR. BORK: Well, take the Pentagon Papers case.

MR. BUCKLEY: Yes.

MR. BORK: There is — I wasn't approving of Mr. Ellsberg, but one can imagine a case in which something really horrendous is going on, in which

somebody who had taken an oath not to reveal matters discovers this and violates his oath because it is so terrible. The holding of people against their will — sort of an American concentration camp — to take an extreme hypothetical . . .

MR. BUCKLEY: A Nuremburg type . . .

MR. BORK: Yes, in which it seems to me civil disobedience is called for, but that's an extreme case. You have to ration yourself as to how many times you're willing to engage in civil disobedience. In fact, I would think people almost ought never to, but there is an extreme case.

MR. BUCKLEY: You don't think that Martin Luther King's letter from Birmingham jail is a charter for correct thought on this subject?

MR. BORK: I don't recall the terms of that letter, but Martin Luther King generally violated in and order to test it in court. You know, to test its constitutionality. And setting up a test case is a far different matter from civil disobedience . . .

MR. BUCKLEY: That's been sort of baptized by American tradition. It's a way of invoking . . .

MR. BORK: Invoking a higher law.

MR. BUCKLEY: . . . judicial considerations.

MR. BORK: Yes. We have an odd system in which it is impossible for the most part to test the constitutionality of a law without violating it.

MR. BUCKLEY: Selma was a case in point, wasn't it?

MR. BORK: But that's a different matter morally, and I think, ought to be legally, from a statement that "I know that's the law; I know it's not unconstitutional; but I choose to violate it."

MR. BUCKLEY: Well, as someone who once took an oath to abide by the Constitution, what kind of agony did you find yourself in when, as the principal law enforcement officer of the United States, you found yourself enforcing laws that you considered to be unconstitutional as a result of these usurpations by the Court?

MR. BORK: That was difficult, and there were occasions upon which I said I would not sign a brief or occasions upon which I said we will not take this line of argument, even though it can be found in prior precedent, because it's a corrupt line of argument . . . you know, if it can be reached by a more traditional way, we'll do that. By and large, I don't recall that we had cases at the margin that much so that I found myself in a great quandary a great deal of the time.

MR. BUCKLEY: Let me ask you this, Mr. Ennis: If Mr. Bork is correct that

there is absolutely no authority in the Constitution of the United States for *Roe* v. *Wade*, might you find that that decision, which authorized abortion more or less on demand, could very well, given the profound conviction of a number of people, that it's human beings that you are in fact killing, not inanimate objects, would this be a case in which the ACLU would recognize the transcendent right of an individual who attempted to defy that particular practice in the same sense that some people defied the fugitive slave act?

MR. ENNIS: Well, I don't think the ACLU has taken any position as an organization on that issue. The abortion cases are certainly examples of judicial activism. The question is whether it is impermissible judicial activism, since the judiciary is supposed to actively protect legitimate constitutional rights. The question, therefore, is whether it is a constitutional right of a woman to choose whether to have or or not have a child, and the particular difficulty in the abortion cases is that it is harder to see that easily than in some areas, for two reasons. One reason is that it involves women, who are not a discrete and insular minority totally excluded from the political process and unable to achieve their rights through the political process, and the other is that the constitutional principle the Supreme Court was relying on in those cases is the principle of privacy. And the principle of privacy itself is not expressly stated in the Constitution, but is implied from other provisions of the Constitutions. I happen to agree with those decisions, but I do think they are activist decisions and are more difficult to justify than, for example, *Brown* v. *The Board of Education.*

MR. BUCKLEY: Yes, but when you say, "I happen to agree," you've got to be a little bit clearer, because you agree with what you agree with.

MR. ENNIS: I agree with . . .

MR. BUCKLEY: You agree that if you were a member of the Court, solemnly pledged to defend the Constitution, you would have voted with the majority in that decision?

MR. ENNIS: Yes, I would, because I do agree that there is a constitutional right of privacy as the Supreme Court believes, though it's not expressly stated.

MR. BUCKLEY: And you would undertake to reify it?

MR. ENNIS: Not to reify it, but there are other important constitutional rights that are not expressly stated in the Constitution. For example, there is a constitutional right to require proof beyond a reasonable doubt in criminal prosecutions. That's not expressly stated in the Constitution, but it's such a part of our heritage and tradition that the Court has recognized

it as a constitutional right. So, too, the right of privacy.

MR. BUCKLEY: You mean the legislature couldn't change the presumption of proof? It certainly did in *Sullivan* v. *New York Times.*

MR. BORK: That was not a criminal case, but the thing that worries me is this constitutional right of privacy was created by the Supreme Court suddenly in Griswold against Connecticut on reasoning which will not bear analysis for a moment and when you got to the abortion case, Roe against Wade, there is no reasoning. You're told that the American Medical Association kind of agrees with this and that therefore it's the law. Suddenly the views of medical professionals became the Constitution with no argument. It is one of the clearest examples of a flat fiat without argument I've ever seen the Court engage in, and there is yet, I think, no successful defense of those cases by any scholar in the law.

MR. BUCKLEY: Is that right? Would you undertake an academic defense of that decision, Mr. Ennis?

MR. ENNIS: Well, it depends on what you think the Constitution means, and that, of course, is where we're going to disagree on individual cases. I agree with the Supreme Court that the Constitution does protect a right of privacy — really, personal autonomy — and I also agree with the application of that right in this context, that a woman ought to have the right to choose what happens with her own body, at least in the circumstances where that has been authorized by the Supreme Court. But others could obviously disagree with that position. That's the problem when we're trying to have a Supreme Court interpret broad principles and apply them to the facts of the case.

MR. BORK: I think we've now come down to the point. Mr. Ennis, the position really is that the Constitution is a mandate for the Court to do what is good and just and proper in the views of the Supreme Court and, perhaps more fundamentally, in the views of the ACLU.

MR. ENNIS: No, no.

MR. BORK: And my position is the Constitution is a document which can be interpreted like other legal documents and limits the Court and prevents it from doing good in — social good — in particular cases. The abortion case cannot be derived from anything in the Constitution, not its language, not its history, not its practical construction. I have no particular objection to the code that was written by the Supreme Court. It just does not come from the Constitution.

MR. ENNIS: Can I make a slight disagreement with you? I don't think that the Supreme Court has the right or should have the right to do whatever it thinks is right. There's an important area here of judicial activism that we

might agree about. The Constitution expressly says that the Supreme Court does not have unlimited power. It only has the power to decide actual cases or controversies before it. It can't reach out and give what are called advisory opinions. But the Supreme Court — the current Supreme Court — has consistently ignored that constitutional limitation on its own power. In *Washington* v. *Davis*, an important case, in the Alyeska Pipeline case, in *Quern* v. *Jordan*, the Supreme Court reached out to decide issues that were not before the Court in those cases, even though the parties in those cases said, "We're not raising this issue; we're not briefing or arguing this issue," the Supreme Court nevertheless gave what I regard as an advisory opinion overruling a host of lower court decisions that were not before the Supreme Court. That is not a strict construction of the constitutional limitations on the Supreme Court's power, and I think those decisions were impermissibly activist, so I hope I'm not seen as an apologist for the Burger Court's activism. Not at all.

MR. BUCKLEY: It's terribly easy to get your Madalyn O'Hair or anybody you want to act as sort of agent provocateur. You just slip them a couple of dollars to call up the nearest activist lawyer, and you've got yourself a case. As a practical matter, if the Supreme Court is interested in a particular forum, it never has to wait very long before somebody's going to bring it up.

MR. BORK: It has only to invite. The Warren Court invited these kinds of litigation.

MR. BUCKLEY: I see.

MR. BORK: . . . and it began to come in.

MR. BUCKLEY: Yes.

MR. ENNIS: It's a little more difficult than that, because there are rulings on standing, justiciability, mootness, rightness, all of which weed out cases to prevent simply collusive cases getting to the Supreme Court.

MR. BUCKLEY: All of which we will overcome. But just before we turn to Mrs. Pilpel, let me ask you this one word and ask you what has been the reaction of the professional community to the book, *The Brethren*, insofar as it is constructed out of a series of breached confidences? Is this something that has dismayed the fraternity, or is the notion that telling all . . . the hang-out road . . . is the first virtue? Does that simply dispose of any problems?

MR. BORK: No. I think the professional community, by and large, is somewhat disturbed, particularly because of the gossipy and malicious nature of many of the revelations. That is not a book that addresses important questions about judicial activism. It's a book that might have been written

by Walter Winchell. It's got a lot of gossip about what some justices think about other justices, and I think the profession finds it distasteful on that ground as well as on the ground of the breached confidences.

MR. BUCKLEY: Does it feel it is distasteful because of a sort of lese-majeste, or is it prepared to look at the Supreme Court other than as the highest tribunal of lawyers? Are they offended in the same sense that a Moslem would be affected by an attack on the mosque, or are you offended by general principles?

MR. BORK: I think if the revelations had had to do with the Court's performance of its constitutional function, the profession would have been less offended.

MR. BUCKLEY: I see.

MR. BORK: The revelations, in fact, are scandalous in a minor way. They're gossipy. They're quite anti-Burger, and it's just not an important book and not worth those breaches of confidence.

MR. BUCKLEY: Mrs. Harriet Pilpel, who is just in from a fashion show, as you can all tell, is a distinguished lawyer in New York known to all of you, member of the firm Greenbaum, Wolff and Ernst, a leading advocate of abortion and other freshly discovered rights. Mrs. Pilpel.

MRS. PILPEL: I'd like to start with abortion, but I know I'd never get beyond that, so I hope you'll give me a few more minutes at the end of defend and to explain why I think there is a clear constitutional basis for the right of women to choose whether or not to have a child, just as I think there's a clear constitutional basis in answer to your question, when a state agency puts a child somewhere and treats it or doesn't treat it in such a way that it dies, it seems to me that has something to do with the constitutionally guaranteed right to life, just as abortion has to do with the constitutionally guaranteed right to liberty against state action. But before I get to that, I would like to say that I think the whole discussion of what is activist and what is strict constructionist is in a way a question of semantics. There is absolutely no way in which you can interpret the Constitution except by trying to figure out what broad general terms mean. As Bruce Ennis has pointed out, statutes are more specifically expressed, but even as to statutes, man has yet to devise wordage which is not capable of more than one meaning.

MR. BUCKLEY: How about two plus two equals four?

MRS. PILPEL: Well, I gather that under the newer mathematics that is not necessarily true, but that is . . .

MR. BUCKLEY: Is that true?

MR. BORK: I don't think so.

MR. BUCKLEY: I'm surprised the Supreme Court hasn't said such.

MRS. PILPEL: But I would like to point out that, one, the Constitution speaks in words of due process of law: No one shall be deprived of life, liberty or property without due process of law. That would be absolutely meaningless if you did not have some infusion of meaning in it by someone, and many of the cases that Professor Bork deplores are cases in which the United States Supreme Court has attempted to define due process of law. We can also take the First Amendment: Congress shall make no law abridging freedom of speech and of the press. Well, what abridges freedom of speech and of the press? That's rather specific. But do libel laws abridge freedom of speech? They do tell you what you can't say without having to pay damages. Do privacy laws? What about the copyright law? What about laws about treason and espionage? I mention these examples merely for the purpose of stating that you are not either an activist or a strict constructionist when you try to infuse meaning into constitutional guarantes.

MR. BUCKLEY: But you are certainly one rather than the other if you are given to wild improvisations.

MRS. PILPEL: Well, I don't see wild improvisations, and again reserving for a moment the abortion question, Professor Bork says that "The Court does not have the right to make up constitutional rights." Everybody would agree with that as a general statement, but the 9th and 10th amendments of the Constitution say that all rights not specifically delegated to the federal government and not expressly reserved to the states are reserved to the states and the people. So there are some rights which the Constitution and the Bill of Rights recognize are not specifically set forth. Now I am perfectly willing to talk the abortion issue for a moment. As far as Roe against Wade is concerned, it may be that no professor or anyone in the academic community has given an explanation satisfactory to Professor Bork. I find no difficulty with those decisions, because I know that the Constitution says that no one shall be deprived of liberty, which presumably means freedom of decision, without due process of law. One of the liberties . . .

MR. BUCKLEY: But there were laws. There were state laws.

MRS. PILPEL: Without due process of law — that is not a substantive concept as to what it is. You have to define it. There were state laws which said to women, "You may not choose to have an abortion." That was an incursion of their liberty.

MR. BUCKLEY: Well . . .

MRS. PILPEL: The Court was faced with a choice between the liberty of

women to make that decision and the assumed or alleged rights of the fetus. I don't think we ought to turn this discussion into a discussion of Roe against Wade, but if anything is clear to me — and because perhaps it's because I'm a woman —

MR. BUCKLEY: Mrs. Pilpel, you . . .

MRS. PILPEL: There is something in the Constitution that must assure to members even of my sex the right of freedom of choice as to when and whether to have a child.

MR. BUCKLEY: You have an engaging technique of saying, "Here is what we are not going to talk about," and then you give us a 10-minute lecture about what we're not going to talk about.

MRS. PILPEL: Well, I thought I wouldn't get a chance otherwise.

MR. BUCKLEY: Because there's nothing left to be said about it after you've discussed it.

MRS. PILPEL: I hope not.

MR. BORK: The argument that you're making is one that says men may not be drafted into combat because they have a right of privacy and they have a right to the integrity of their bodies. All right. Maybe they don't, but we're going to let the Court decide that, rather than the political institutions decide that. The argument, in fact, goes to the point that the Court may judge the constitutionality of every law on the books because somebody claims it violates his personal or physical integrity to apply that law to him . . .

MRS. PILPEL: Well, there's no . . .

MR. BORK: . . . which is a complete judicial power over everything.

MRS. PILPEL: There is no question but that liberty is guaranteed against government action by the Constitution, and there's no question that the draft, for example, takes away one's liberty. Now somebody has to decide whether that's a permissible taking away of such liberty, and I believe that from John Marshall onwards it was the appointed function of the Court to attempt to decide whether there was a liberty here which had been infringed in an impermissible way.

MR. BUCKLEY: Why should they decide it? Suppose that I go to the Supreme Court and say, "I resent my liberties being taken away by that stoplight out there." (laughter)

MRS. PILPEL: All right. The answer . . .

MR. BUCKLEY: "I want to be able to drive right through there."

MRS. PILPEL: The answer to that question . . .

MR. BUCKLEY: And the Court properly says, "Look, we're not going to decide what are the liberties beyond those specifically enumerated in the Constitution."

MRS. PILPEL: But, in the case of the draft the rights of conscientious objectors were recognized, not only by the Court but by the people of the United States, and it was obviously the opinion of everyone here that if a person had a conscientious objection to being in the military service, he had the right to an alternative. No one has questioned that. I'd like to repeat something that Bruce Ennis said before, which I think gets lost in your questioning, Bill, particularly. And that is that we have a constitutional democracy, not a majoritarian democracy. All of your questions assume that we have a government in which the majority of the people will decide for everybody.

MR. BUCKLEY: No, no, no. No, no. Subject to the Constitution. The Constitution, I think . . .

MRS. PILPEL: But who's going to interpret what the Constitution means?

MR. BORK: No. The question is, how do you interpret the Constitution, not who?

MR. BUCKLEY: Yes.

MR. BORK: If you can get it from the text, from its history, from the structure of the document itself . . . in a way that a lawyer construes documents . . . fine. We have no problem. It's a constitutional right. But if you . . .

MR. BUCKLEY: The intention . . .

MR. BORK: But if you begin to make it up in the way that the Court has made it up — in the abortion case, in the conception cases, in the reform of electoral process, one man-one vote, in the ways it's done in many, many cases — there is nothing in the Constitution and you don't have either democracy or constitutionalism. What you have is a 5-4 vote by nine lawyers.

MRS. PILPEL: That is your opinion, and it is a valid opinion, just as the four voters who dissented had a valid opinion. There are very hard questions . . .

MR. BUCKLEY: They can't be valid . . .

MRS. PILPEL: . . . when it comes to a . . .

MR. BUCKLEY: You can't have two valid opinions that are contradictory.

MRS. PILPEL: Yes, you can, if you are interpreting a document which can reasonably be interpreted . . .

MR. BUCKLEY: You can say tenable, but not valid.

MRS. PILPEL: Well, I'm not going to argue about the terminology. I am quite . . . It is clear . . .

MR. BUCKLEY: But terminology expresses you.

MRS. PILPEL: The Constitution . . .

MR. BUCKLEY: Maybe we shouldn't have had a Constitution in the first instance.

MRS. PILPEL: The Constitution is not self-explanatory. Many provisions in the Constitution are somewhat obscure in their meaning, and even if they were less obscure, they would raise questions of interpretation when applied to particular people in particular fact situations, as Mr. Ennis said. Therefore, when one person, such as Professor Bork, says it is clearly this way and another person, or persons, such as the majority of the Supreme Court, says it is clearly the other way, neither of them is an activist or a strict constructionist. They are using their best efforts, their best brains, to decide what is otherwise ambiguous meaning.

MR. BUCKLEY: Now Mrs. Pilpel, the author of Title VII of the 1964 Civil Rights Act in the House was Representative Celler. In the Senate, it was Hubert Humphrey. Both Hubert Humphrey and Celler in the course of 84 days of debate said that particular title would bar discrimination against anybody as a result of race under any circumstances. Now, I don't know how something can be clearer than that. For the Supreme Court to transcend the meaning of two living men . . .

MR. BORK: They went further and said that it would not permit racial balance by discriminating against a race.

MR. BUCKLEY: Right.

MR. ENNIS: Can I say something about that . . .

MR. BUCKLEY: Sure.

MR. ENNIS: . . . that comes up in the context of the Weber case under Title VII. The Supreme Court there said that discrimination means invidious discrimination. It does not mean a benign effort to correct past wrongs. In the Weber case no white employee of the corporation had anything taken away from him . . .

MR. BUCKLEY: That's proportional representation you're talking about.

MR. BORK: Yes. Why doesn't he have anything taken away from him . . .

MR. ENNIS: Because . . . let me explain.

MR. BORK: . . . when he doesn't get training or promoted . . .

MR. ENNIS: No. He does. The voluntary affirmative action plan in Weber

created a new training program which, for the first time, allowed white employees of that corporation to qualify for higher jobs in the corporation, for which they could not previously have qualified . . .

MR. BUCKLEY: You mean blacks?

MR. ENNIS: No. Whites.

MR. BUCKLEY: Oh, whites.

MR. BORK: Mr. Ennis, you do not mean to say that if that had been an existing training program, and they put in proportional representation that that would have been a violation of the Civil Rights Act.

MR. ENNIS: I . . .

MR. BORK: I think you're seeking an out . . .

MR. ENNIS: No. I'm not seeking an out. What I'm trying to . . .

MR. BORK: Your principle is broader.

MR. ENNIS: . . . explain the Supreme Court's decision there of the results of the voluntary affirmative action program in the Weber case was that both blacks and whites had, for the first time, an opportunity which neither group had before that plan.

MR. BORK: I don't think that's the Supreme Court's opinion.

MR. ENNIS: Well, it's the facts of the case, so it has to be the Supreme Court's opinion.

MR. BUCKLEY: Gentlemen. Professor Bork, Mr. Ennis, Mrs. Pilpel, ladies and gentlemen, thank you very much.

APPENDIX C

[We reprint here the text of the brief Amicus Curiae *signed originally by 238 Members of Congress and submitted (in* re Harris *v.* McRae*) to the United States Supreme Court on March 18, 1980. The brief was prepared by the attorneys for the* amici, *John T. Noonan, Jr. (University of California School of Law, Berkeley), Basile J. Uddo (New Orleans, Louisiana) and William B. Ball (Harrisburg, Pennsylvania). The list of the signing Members appeared (in the printed brief) where the * appears below; for space reasons, we have included them here at the* end *of the brief. As noted,*[1] *Senator Jesse Helms and Representative Henry Hyde are not included among the* amici.*]*

Interest of the *Amici Curiae*

The *amici curiae* consists of 238 members of the Congress, including more than a majority of the members of the House of Representatives . . .*

The *amici curiae*, as members of the Congress of the United States, are vested, by Article I, Section 1, of the Constitution, with all legislative powers granted in the Constitution. It is their sworn duty and common purpose to "support and defend" the Constitution of the United States.

Article I, Section 9, Clause 7 of the Constitution provides: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." The Congress is the sole law-making body under the Constitution. Clause 7 establishes the appropriations power in the Congress and the Congress alone.

In the present case, a judge of the United States District Court for the Eastern District of New York has held an appropriation act of the Congress unconstitutional and ordered the Congress to spend moneys not appropriated.

It is the interest herein of the *amici curiae*, as members of the Congress, to protect the constitutional powers of that body over appropriations. Closely related to that interest, and of profound concern to the *amici*, is their interest in the preservation of that essential principle in the American Constitution known as the separation of powers.

The *amici* desire to point out to the Court that their interest in presenting this brief is not with respect to the question of abortion. The *amici* consist of members of the Congress who have voted for the Hyde Amendment (restricting the funding of abortions) and who have voted against that amendment.

The unique interests of the *amici* in protecting both the Congressional power of the purse and the principle of separation of powers have not been presented by other parties in this case. Counsel for all parties have consented to the filing of this brief.

Summary of Argument.

Independently of any other issued involved in this appeal is the primary

concern of the members of Congress who are *amici* here, with respect to the separation of powers, the law-making power of the Congress, and the fact that the judgment of the court below violates the appropriations power of the Congress as given in Article I, Section 9, Clause 7 of the Constitution. The enactment known as the "Hyde Amendment" is an appropriations act according to long-established Congressional, executive and judicial understanding of the nature of appropriations. The district court erred in treating that enactment otherwise.

The appropriation and expenditure of tax funds is inherently a political question and therefore was explicitly left to that branch of our government which is closest to the people and most responsive to its needs and sensitivities. The frequent refusal of Congress to appropriate (as seen in riders to annual appropriations bills) points clearly to the inherently political nature of the appropriations process.

The case at bar involves an express refusal by the Congress to appropriate moneys in the exercise of an explicit unconstitutional grant of power. U.S. Const., art. I, § 9, cl. 7. This Court has never taken the position that the judiciary may oversee the appropriations process or set itself up as the ultimate arbiter of federal fiscal policy.

To so hold would embroil the judiciary in a process which would require constant and ongoing judicial balancing of competing political demands for limited financial resources. Such power was explicitly left to Congress by the founding fathers and any change should come pursuant to the Article V Amendment process, not by judicial decree.

Argument.

I. The District Court's Order Violates the Appropriations Clause of Article I.

The Constitution, Article I, Section 9, Clause 7, provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This language is plain and has been faithfully observed since its adoption. Until the instant case, it had governed the conduct of our government and marked an essential difference between the judicial and legislative branches.

The Court has before it a judicial order that challenges this section of the Constitution. That the order of the district court draws money from the Treasury, or attempts to draw it, can scarcely be denied. That, however, it appropriates money "by Law" must be denied. "By Law" refers to the legislative power, all of which is vested by Article I, Section 1, in the Congress. The district court's order, not, of course, being an appropriations bill, cannot draw money from the Treasury.

The district court's position can be paraphrased thus: "Congress appropriated the money for Medicaid with a condition which we find unconstitutional. We strike the condition. The appropriation already made by Congress now operates without the restriction which the condition had attached and funds the very activity for which the condition denied appropriations." That response, however, ignores the nature of the appropriations power, disregards the practice and the precedents of Congress, and in the most fundamental way subverts the Constitution of the United States by making meaningless the reservation to Congress of the right to determine when "Money shall be drawn from the Treasury."

The Three Deficiencies of the District Court's Order.

1. That the Act before the Court is an appropriations act is beyond cavil. It is the annual Act appropriating money for the Departments of Labor and Health, Education and Welfare. Whether in the form of a regular appropriations act as in 1976 and 1978 or in the form of a Continuing Resolution as in 1977 and 1979, it supplies money. It originates in the House of Representatives. It is the object of deliberations by the Committee on Appropriations of the House. Like many other appropriations acts it says in so many words what it is appropriating money for and what it is not appropriating money for. In explicit terms it says it is not appropriating money to pay for abortions except in certain specific situations. Except for these situations, the Act says, "None of the funds contained in this act shall be used to perform abortions." The court below held the invalidated provision (the Hyde Amendment) to have effected a substantive change in the Medicaid Act, 42 U. S. C. § 1396, *et seq.* Slip op. 282-283. Accord, *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121 (lst Cir. 1979). While other courts have recently held to the contrary, *e.g., Doe* v. *Busbee*, 471 F. Supp. 1326 (N. D. Ga. 1979), *Hodgson* v. *Board of County Commissioners*, No. 4-78 Civ. 525 and No. 3-79 Civ. 56 (D. Minn. 1979), *Planned Parenthood Affiliates of Ohio* v. *Rhodes*, — F. Supp. — (S. D. Ohio 1979), *amici* consider the point irrelevant. Whatever its relationship to other enactments, the Hyde Amendment was part of an appropriation bill and an exercise of the appropriation power of the Congress.

"None of the funds contained in this act" is the language by which Congress has frequently refused to appropriate money for a specific purpose. For example, such language is used in 92 Stat. 1025 (1978), the general appropriations act for the State Department, to refuse to appropriate money for the promotion of the doctrine of one world government. The appropriations act for Labor and Health, Education and Welfare for that year uses the same language to refuse to appropriate money for any activities on behalf of any alien who is illegally in the country. 92 Stat. 1571 (1978). The same appropriations act uses the same language to refuse

to appropriate money for a loan or salary to any individual at an institution of higher education who had used force to attempt to change the curriculum. 92 Stat. 1589 (1978).

Language of this kind is negative. It rejects a drawing from the Treasury. The negative cannot be converted by judicial magic into something positive. The refusal to draw cannot be made into a mandate to draw plus a condition.

The order of the court below treats "none of the funds contained in this act shall be used" as a condition. The wording is not the wording of a condition. Nothing in the Act, says, "Money is appropriated on condition that it not be spent for abortion." The only "conditions" in the act are the exceptions which specify the conditions under which abortion may be funded. If these exceptions are struck as too restrictive, there remains only the negative prohibition. Excising the exceptions which are stated leaves simply an absolute refusal to appropriate for abortion.

Under Rule XXI of the Rules of the House of Representatives, the language of refusal could not have been voted on in connection with an appropriations bill if the House had not deemed it to be language "retrenching expenditure." *Constitution, Jefferson's Manual and Rules of the House of Representatives*, Sec. 835 (ed. Deschler, 1967). Substantially the present form of the retrenchment rule known as the "Holman Rule" had been adopted in 1876 and employed till 1885. It was revived in 1912 and has continued in effect until the present. *Ibid.* There is a substantial body of precedents indicating the House's understanding of the Rule. These precedents indicate that a limitation on the use of appropriated funds constitutes a decision not to appropriate for that purpose. See, *e.g.*, Ruling of the Chair, January 27, 2931 (limitation offered by Fiorello La Guardia). Cannon, *Precedents of the House of Representatives,*7.

In dozens of rulings on amendments offered under the Holman Rule, the House for over a century has taken the position that amendments so offered become, if accepted, part of the appropriations act itself. See, C. Cannon, *supra*, secs. 1431-1560 (1935). They are not considered separate legislation. If they are voted in, the appropriations act is limited by the words of the amendment. Consequently, when the Act says "None of the funds contained in this act shall be used . . .," the Act no longer contains an appropriation for the purpose for which "none of the funds" can be used. Simply put, there are *no* funds appropriated for the proscribed purpose, and *none can become available unless Congress appropriates them anew.*

There can hardly be disagreement that it has always been understood that the formula used in a Holman Rule amendment is an *explicit* declaration that Congress is not appropriating for a use that might otherwise be thought to fall within the appropriation. After such an amendment has

been accepted, no law exists by which an appropriation for this use has been made.

The district court's order, therefore, ignores the nature of the appropriations power. The order assumes that there is some general sum appropriated with a variety of conditions attached which federal judges are free to alter if they think it constitutionally desirable. But the essence of the appropriations power is the ability to appropriate or not appropriate. Congress exercises that power when it says it is appropriating money and when it says it is not appropriating money. The power is fully and effectively exercised when Congress says it is not appropriating. Under our Constitution no federal judge is empowered to turn that negative into an affirmative.

2. The district court's order also disregards the practice and the precedents of Congress. For over a century, amendments of the Holman Rule type have been a central part of the appropriations process in Congress. The Democratic Study Group has observed that this kind of restriction has been used for a vast variety of purposes from controlling water projects to ending police activities in Vietnam and preventing the Central Intelligence Agency from destabilizing foreign governments. See *Democratic Study Group of the United States, House of Representatives, "The Appropriations Rider Controversy," Special Report No.* 95-12, February 14, 1978, p. 6. The explicit refusal to appropriate money for a specific purpose is an essential tool of democratic control of the business of bureaucratic government. To treat such explicit refusals to appropriate as conditions which a single federal judge may brush aside is to pay neither respect nor attention to the experience of a coordinate branch of government.

3. Finally, the district court's order subverts Article I, Section 9, of the Constitution. In an age marked by an immense increase in constitutional litigation it is remarkably easy to convert any disappointment on policy into a claim that a constitutional right has been infringed. If the court below is right, any group which has lost a legislative battle so completely that appropriations have been explicitly denied them is free to rush into the federal courts — as the appellees did — obtain an injunction requiring the expenditure of money for the purpose for which Congress has explicitly refused to appropriate, and through the agency of a single federal judge achieve what the Constitution had committed to the care of Congress.

The district court's theory gives a power something like a line item veto to the federal judiciary. Given the ease with which policy disputes may be converted into constitutional questions, a loser in the legislative process can acquire a new forum by asking a federal judge to strike any specific refusal to appropriate, and on the theory of the court below the non-

appropriation will become an appropriation. The power which a federal judge can thereby exercise is greater than the veto power of the President. The President can only reject entire acts, and he can never turn a non-appropriation into an appropriation. The district court's theory permits a federal judge to pick a specific provision, invalidate it, and by the very invalidation make appropriated what Congress had declined to appropriate.

Indeed if a federal court is empowered to change a refusal to appropriate into an appropriation because of a judge's constitutional misgivings, why not the President, too? The President is sworn to uphold the Constitution. If he deems a restriction in an appropriations act unconstitutional, why may he not, on the district court's theory, ignore the restriction and treat as appropriated what Congress had refused to appropriate? Neither in logic nor in practice could the Executive branch be asked to limit itself if the district court's view of the appropriation power is sound. Every federal district judge and the President and the President's appointees would have a charter to treat funds as appropriated in accord with their own understanding of the Constitution. If the integrity of the appropriations process as a power belonging to Congress is to be preserved, there can be no picking and choosing by President or court among provisions of an appropriations act. If an appropriations act is unconstitutional, let a court so say. But the appropriations power of Congress is gone if a court or the President may amend an appropriations act and turn a non-appropriation into an appropriation.

President Nixon, it may be recalled, picked and chose among provisions of an appropriations act and declared that he was impounding certain appropriated funds. This impoundment of over eight billion dollars was characterized as exercise of "a line item veto," and legislation was soon introduced to correct it. See 119 *Cong. Red.* 5086 (1973). It was noted that the President's action was contrary to the advice he had received from the Assistant Attorney General in charge of the Office of Legal Counsel. *Ibid.* It was observed that the President's action hurt "America's most disadvantaged groups" and at the same time destroyed the separation of powers. The President, it was pointed out, "is not empowered to sign the bill and then substitute an amount of his own choosing for that specified in the law." *Id.* at 10160. This invasion by President Nixon of the appropriations power was characterized as an "abuse of his powers" and given as an example of how President Nixon "systematically arrogated to himself the powers of Congress." See Additional Views of Rep. Holtzman, *Report of the Committee on Judiciary, House of Representatives, Impeachment of Richard M. Nixon, President of the United States*, 93rd Cong., 2nd Sess. Report No. 93-1305 (1974) p. 301; see also Additional Views of Mr. Conyers. *Id.* at p. 291. But what President Nixon did was far less than the

district court did when it not only exercised a line item veto but turned a negative into an affirmative.

This is not a case like the *School Desegregation Cases* where the federal judiciary is enforcing the paramount law of the land against individual States and where, absent Eleventh Amendment problems, the Constitution poses no barrier to this Court's requiring the States to provide a remedy. Even in such a case a federal court order may have a "profoundly disturbing" financial impact, Powell, J., concurring in judgment, *Milliken* v. *Bradley,* 433 U.S. 267, 298, n. 3 (1977). This is a case where there is an express constitutional provision protecting a co-ordinate branch of the federal government.

The Extent of the Challenge to the Constitutional Authority of Congress.

This issue is not limited to the abortion question; the inviolable and exclusive power of the purse is one that touches on all of what Congress does. To tamper with that exclusive power is to tamper with the very essence of constitutional, representative government. Once done, Congress could become a mere bookkeeper for a judiciary, or even executive, that has arrogated unto itself a power denied it by the framers of our system.

So clearly has this been understood that some of the harshest language ever used to describe a violation of the separation of powers has been used with respect to this problem. Montesquieu wrote:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined with the executive power, the judge might behave with violence and oppression.

The Spirit of the Laws, 154 (6th ed. 1792, T. Nugent, trans.).

Madison was even more direct on the proper view of the appropriations power in his Federalist Paper No. 58:

> The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse —that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58 at 380 (Modern Library ed.) (J. Madison). Hamilton was equally adamant in his Federalist Paper No. 78:

> The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary,

> has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment.

Id. at 504. Congress' exclusive power of the purse, therefore, has its roots in clear and unambiguous history.

With unblemished consistency this Court, and the federal courts in general have understood and respected this very basic separation of powers between Congress and Court. Whenever the issue has been raised this Court has concluded that an appropriation by Congress is required before moneys may be drawn from the federal Treasury. *Knote* v. *United States*, 95 U. S. 149 (1877); *Austin* v. *United States*, 155 U. S. 417 (1894); *Hart* v. *United States*, 118 U. S. 62 (1868); *Reeside* v. *Walker*, 52 U. S. (11 How.) 623 (1850). And see *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308 (1937); *United States* v. *Lovett*, 328 U. S. 303 (1946).

The Civil War gave this Court several opportunities to confront the appropriations question. After that war numerous controversies arose over Congressional attempts to limit the payment of the claims of persons who had aided the Rebellion, but who had subsequently received Executive pardons. In *Knote* v. *United States, supra,* President Johnson pardoned petitioner Knote for his part in the Civil War and relieved him of all disabilities and penalties attaching to his rebellion. Pursuant to that pardon Knote sought to recover the proceeds of his property previously condemned and sold under an earlier confiscation act. At the time of his claim the proceeds had already been paid into the U. S. Treasury.

Counsel for Knote raised the issue squarely: "The proceeds of the sale of the claimants' property are held by the government. . . . His right to them under the pardon imposes legal obligations on the government, and *may be judically enforced.*" *Knote* v. *United States, supra*, at 151 (emphasis added). This Court's reply was equally clear: Undoubtedly Knote had a right to the restoration of his property, but ". . . if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only *be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.*" Id. at 154 (emphasis supplied). Contrary to the argument of the petitioner's counsel, this Court held that no judicial remedy could draw funds from the Treasury; such was beyond the control of the Court: *See also, Austin* v. *United States*, 155 U. S. 417 (1894); *United States* v. *Klein*, 13 Wall. (80 U. S.) 128 (1872) and *Hart* v. *United States*, 118 U. S. 62 (1886).

In *Reeside* v. *Walker, supra,* the estate of James Reeside sought and won a set-off of its claims against those of the United States. The jury found that the government was, in fact, indebted in the amount of

$188,496.06. In an attempt "[t]o save future expense and litigation in [the] case, with a view to obtain[ing] the desired judgment" this Court articulated the clear and unambiguous rule that a court may not order the Treasury to pay out unappropriated moneys:

> No officer, however high, not even the President, much less a secretary of the treasury or treasurer is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the treasury department, the plaintiff would be as far from having a claim on the secretary or treasurer to pay it as now. The difficulty in the way is the want of any appropriation by congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by congress. See Constitution, Art. I, § 9, 1 Stats. at Large, 15.
>
> However much money may be in the treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.
>
> Hence, the petitioner should have presented her claim on the United States to congress, and prayed for an appropriation to pay it. If congress after that make such an appropriation, the treasury can, and doubtless will, discharge the claim without any *mandamus*. But without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made. 52 U. S. (11 How.) 626-28 (emphasis by the Court).

Thus, even in the face of a binding obligation or judgment, or an unconstitutional withholding of funds in the Treasury, no court may order the funds to be paid where not authorized by Congress. *Stitzel-Weller Distillery* v. *Wickard*, 118 F. 2d 19 (1941); *Collins* v. *United States*, 15 Ct. Cl.22 (1878); *Doe* v. *Matthews*, 420 F. Supp. 865 (D. N. J. 1976). And see *Cincinnati Soap Co.* v. United States, 301 U. S. 308 (1937); *Spaulding* v. *Douglas Aircraft Co., Inc.*, 60 F. Supp. 985 (S. D. Cal. 1945). In the case at bar, appellees are requesting precisely such relief since they seek not merely a declaration of rights, but an order to spend funds expressly not appropriated.

Again, in *United States* v. *Lovett, supra*, this Court and the Court of Claims had occasion to apply the rule against court-ordered appropriations. *Lovett* was a challenge to an appropriations measure that provided that certain named government employees not be paid their salaries unless Congress confirmed their continued employment. The three named individuals continued to work despite the Congressional act and sued for their compensation in the Court of Claims. That court decided that the claimants were entitled to the money, but did not entertain the illusion that it could order the Treasury to pay, or the Congress to appropriate, the funds:

> Congress, by enacting Section 304, did not foreclose itself from thereafter appro-

priating for the payment of these salaries. Congress even now *may* appropriate, and authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, *may* be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, *may* be satisfied by any appropriation out of which the judgments *may* be by Act of Congress, payable.

Lovett v. *United States*, 66 F. Supp. 142, 147 (Ct.Cl. 1945) *affirmed on other grounds, United States* v. *Lovett*, 328 U. S. 303 (1946). (Emphasis supplied.) The order of the Court of Claims that the plaintiffs were "entitled to recover" specific dollar amounts was the authorization of payment; but as with the usual congressional authorization, an appropriations act was necessary to provide the money.[2]

This Court affirmed the Court of Claims and held the salary prohibition an unconstitutional bill of attainder. But again, no order was made to appropriate or pay the funds. That determination was properly left to Congress. This Court did not reach back to the appropriation, strip it of the salary prohibition, and order payment as though the funds had been appropriated and illegally constrained.

In Congress there was at first disinclination to provide the funds to meet this Court's judgment. The most outspoken congressman in favor of honoring the judgment admitted that it was within the power of Congress to provide the money or not. Congressman Javits, for example, urged that the Deficiency Subcommittee "again consider this matter" 93 *Cong. Rec.* 2977 (1947). Congressman Gwynne observed: "Of course we have the power to refuse to appropriate the money" while urging that it was "duty of Congress to vote the money." *Id.* at 2990. Congressman John F. Kennedy suggested that it was "a question of whether the House should honor a decision of the Supreme Court." *Id.* at 2989; and he went on to say: "If because we have the power in this chamber to do so, we should hold back part of this money and not honor the decision of the Supreme Court, we would be breaking down that division [of the three powers] . . . this claim should be honored." *Id.* at 2990. Congressman Keating, also speaking in favor of providing money to satisfy the judgment, observed as to the successful plaintiffs: "The only way they can translate their piece of paper called a judgment into cash in hand is through an appropriation made by this Congress." *Id.* at 2990. The plaintiffs would never have been compensated had not a nearly evenly divided House — after long debate — subsequently voted 99-98 to pay the amount due under the decision. 93 *Cong. Rec.* 2973-75, 2977, 2987-91 (1947).

The long-standing respect for the appropriation power evidenced in the opinions of this Court has been similarly reflected in lower court decisions. On the very issue raised by the case at bar one district court judge reached the exact opposite conclusion of the court below. In *Doe* v. *Matthews*, 420

F. Supp. 865 (D. N. J. 1976) Judge Buinno faced a challenge to the Hyde Amendment; his opinion reached the heart of the issue:

> [N]one of the cases relied on deal with one obvious question raised by the challenge to the Hyde Amendment, namely, the impact of the provision in the United States Constitution, Art. I § 9 cl. 7 that:
>
> "No money shall be drawn from the Treasury but in consequence of appropriations made by law"
>
> Neither the complaint, the moving papers nor the initial brief discusses this question. Yet it cannot be avoided because, on the record before the Court, the Congress simply has not appropriated any moneys for fiscal 1977 to reimburse Medicaid States with a federal share for elective abortions." *Id.* at 870.

Judge Buinno has stated well the rule that must govern this case. No court has ever done what the court below has done.

The Sources of the District Court's Error.

When the district court first ruled in the instant case, twenty-two days after the law went into effect in 1976, and ordered the Secretary of HEW to pay for abortions throughout the country contrary to the appropriations act, the court was under the impression that it had a precedent in the *Lovett* case. See opinion of Dooling, J., in *McRae* v. *Matthews*, 421 F. Supp. 533, 540-541 (E. D. N. Y. 1976). Plainly, however, the court misread *Lovett* and reached a result directly counter to the self-restraint exercised by the judiciary in *Lovett*. Ruling again in the instant case almost four years later, the court below has put its chief reliance on a very recent decision of this Court which, arising after his initial ruling, seems now to it to justify its extraordinary action in October, 1976, and its return to it in January, 1980. The district court has invoked *Califano* v. *Wescott*, — U.S. —, 61 L. Ed. 2d 382 (1979), decided by a vote of five to four. The court has, however, ignored two vital differences between this recent case and the instant case: First, in *Wescott*, the appropriations issue was not argued to this Court. As the Court observed, the federal appellant did "not question the relief ordered by the District Court." *Id.* at 387 (L. Ed. 2d). Consequently *Wescott* cannot be construed as having disregarded a section of the Constitution and as a departure from an old and settled line of decisions. Second, in the act there under consideration there had been no exercise by Congress of the *appropriations* power. Congress had restricted certain benefits to unemployed fathers. It had not refused to appropriate money for unemployed mothers. It had inserted a broad severability clause, 42 U. S. C. sec. 1303. A single federal judge was not commanding, where Congress had said "No appropriation," that an appropriation be made.[3]

The district court's extraordinary action is based not only on its misreading of *Lovett* and *Wescott*, but also on its belief, disclosed in its

opinion, that the ability of a federal judge to declare a portion of an appropriations act unconstitutional is "the inescapable responsibility of the judiciary." (Slip op. 291-292). This confuses the power of judicial review with the power to appropriate money.

The court below goes on to cite five cases — *The Abortion Cases (Wade* and *Bolton)* and *The Abortion Funding Cases (Beal, Maher* and *Poelker)* — to show that the federal courts can pronounce on the constitutionality of law dealing with abortion. While no one would deny that, none of the cases cited has any bearing on the power of a single federal judge to appropriate money or draw it from the Treasury of the United States.

In the court's opinion appears to lurk the fear that if a federal judge cannot control a Congressional appropriation, Congress will appropriate money for all sorts of unconstitutional purposes without check or balance from the other branches of government. But as *Lovett* makes clear, if an appropriations act does offend against an express command of the Constitution, there is adequate check and balance in the power of the judiciary to declare the act unconstitutional. What the Constitution forbids in Article I, Section 9, is not judicial review but judicial intrusion into the legislative powers and judicial usurpation of the power of the purse.

If this Court should find that a provision of the Appropriations Act for the Departments of Labor and HEW transgresses a command of the Constitution, the Court is free to declare that provision of the Act unconstitutional, leaving Congress the option of not funding these departments or complying with the Court's criteria of constitutionality. Such a remedy, while harsh, is far from vain. It is what in actuality is the appellees' remedy if they are correct in their claim that the appropriations act is unconstitutional. What it has not power to do is to make a non-existent appropriation into an appropriation.

The judicial power of injunctive relief, exercised negatively, goes to the very limit of encroachment on the appropriations power yet still does not convert a non-appropriation into an appropriation; but injunctive relief, exercised selectively and positively as in the instant case, creates an appropriation where none was intended, where indeed an appropriation was denied. The power is a great power which, no doubt, will be exercised sparingly because of the possibility of catastrophic ramifications; the denied power is a great power which, as in this case, may be exercised mistakenly and must inevitably substitute judges for legislators as the holders of the power of the purse.

But the question may then arise, whether a declaration of unconstitutionality without an order of payment is an illusory remedy. Clearly, it is not. If an act of Congress is truly so extreme that it violates the Constitution, and this Court exercises its power to so indicate, it cannot be supposed that Congress would be insensitive to such teaching of this Court.

But it is not within the constitutional power of this Court to compel Congress to appropriate where it chooses not to appropriate.

The "inescapable responsibility of the judiciary" is to exercise the judicial responsibility entrusted to judges by Article III of the Constitution. It is ironic that a district court, invading the power of Congress to appropriate, should defend its action as observing what "is intrinsic to the separation of powers" (Slip op., 292). What is intrinsic to the separation of powers is that each branch of government exercise responsibly the power entrusted to it by the Constitution. Each branch, as this Court has stated, "must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others," but the basic powers of each branch, such as the veto power of the Executive, cannot be shared. *United States* v. *Nixon*, 418 U. S. 683, 704 (1974). The power to appropriate is unshareable.

II. The District Court Erred in Not Dismissing the Action as Nonjusticiable in That It Presented a Political Question.

In the first part of this brief, *amici* have assumed, *arguendo*, that *U. S.* v. *Lovett, supra*, applies, and that this therefore was the kind of case in which judicial review of an appropriations act is in order. In this second part of the brief, *amici* put aside that assumption. *U. S.* v. *Lovett* dealt with a rare kind of appropriations act — an act of Congress found to be in violation of a specific provision of the Constitution and in violation of the rights of three named persons. Like a court order, that act operated upon those persons immediately and directly, and, as the court held, without trial and unjustly, to divest them of individual rights. The act there in question was very different from the appropriations act now before this Court. For the reasons stated below, *amici* submit that *U. S.* v. *Lovett* does not govern here, and that the issue presented in this case, because it presents a political question, is nonjusticiable.

The "political question" doctrine has long informed this Court's decisions on the justiciability *vel non* of certain constitutional issues. The most thorough and oft-cited description of this doctrine is that of Mr. Justice Brennan in *Baker* v. *Carr*, 369 U. S. 186 (1962). The essence of the doctrine is "the relationship between the judiciary and the coordinate branches of the Federal Government. . ."*Id.* at 210. Further, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Ibid.* Justice Brennan defined the doctrine in the following language:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of govern-

> ment; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. While the doctrine requires that only "one of these formulations [be] inextricable from the case at bar" in order to effect a "dismissal for nonjusticiability on the ground of a political question's presence," the instant case involves five of these criteria.

The view of the district court that this case is an act ruled by *U. S.* v. *Lovett, supra*, is plainly erroneous. That case concerned an extraordinary provision refusing to appropriate salaries for three named persons, an act amounting to a bill of attainder. Like a court order it operated to punish these persons. The appropriation in question there involved standards entirely manageable by a court. It did not involve, as does this case, a broad issue of social policy on which the electorate and the elected members of Congress have repeatedly expressed themselves.

1. Textual Commitment of the Power to Congress.

The appropriations clause of the Constitution is found under Article I thereof which defines legislative powers. The appropriations power is textually committed to Congress. In addition, the statement in that clause, "made by Law," plainly refers to appropriations made by and through the prescribed Congressional procedures. Article I, Section 1, vests all lawmaking powers ("[a]ll legislative powers") in the Congress. Consequently, there is no clearer statement in the Constitution that a power is textually committed to a coequal branch. It is similar to the statement of Article I, Section 8, Clause 16 which vests in Congress the power "[t]o provide for organizing, and disciplining, the militia. . ."

In *Gilligan* v. *Morgan*, 413 U. S. 1 (1973) this Court held that this "militia power" was exclusive to Congress and that the Court could not, as plaintiffs asked, evaluate the training of the Ohio National Guard to see whether it was constitutionally deficient under the due process clause. This Court's reasons for finding nonjusticiability in *Gilligan* are similar to the reasons why the action brought by the plaintiffs below should have been dismissed as nonjusticiable:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible — as the Judicial Branch is not — to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.

Id. at 10. This Court went on to say that such issues must remain "[t]he ultimate responsibility [of] branches of the government which are periodically subject to electoral accountability." *Ibid.*

Those words seem tailored for the instant case. The judicial branch has

been consciously excluded from the appropriation decision both because it lacks competence in that area, and because such decisions *must* be made by popularly elected representatives who can reflect the will of their constituencies

2. Lack of Judicially Manageable Standards.

Once it should be held that the appropriations power may be usurped by the courts, the use of that power will predictably not be limited to abortions. A multitude of financial and budgetary questions will be laid at the courthouse door. Every loser in the representative processes will seek a judicial appropriation for his program. Consequently, the courts will consistently be asked to allocate scarce financial resources — allocations that should be made by the elected representatives of the people of the United States.

Consider the examples cited earlier from appropriations acts of 1978. The appropriations act for the State Department says that "None of the funds appropriated in this title shall be used . . . for the promotion, direct or indirect, of the principle or doctrine of one world government," 92 Stat. 1025 (1978). Surely the advocates of one world government have a right of free speech guaranteed by the First Amendment which is no whit inferior to the right to free exercise of religion which the court below has made one basis for its order commanding that public money be spent for abortions. (Slip op. 326-328.) Under the holding of the district court, an advocate of one world government may now challenge the constitutionality of the State Department appropriations act because it denies him money to support his constitutional right of speech.

Or consider the language of the Labor-HEW Appropriations Act cited earlier, which operates to deny federal unemployment benefits to an alien illegally in the country. 92 Stat. 1571 (1978). As an alien has certain constitutional rights, he may now, under the teaching of the court below, litigate to strike such a provision and collect his unemployment pay on the ground that denial of appropriations for this purpose is a denial to him of the very means of subsistence.

Or take the language of the same Act forbidding loan or salary to a student who after 1969 used force to attempt to change college policy on curricula. 92 Stat. 1589. No doubt such a student has a case to make that such discrimination is a penalty imposed without due process of law. Is he free, it may be asked, to litigate his claim and succeed in getting his benefit if somewhere in this country he finds a federal judge who thinks Congress' refusal to appropriate was unconstitutional?

There are as many differences and distinctions drawn in appropriations acts as there are in tax laws. The very recent study by Fischer on the authorization-appropriations process[4] provides a multitude of examples

of the essentially political process of appropriating and refusing to appropriate. Unless this Court is to command uniformity of treatment in the name of Due Process or Equal Protection, each distinction and each difference can be turned so as to present a constitutional difficulty. This Court and the lower federal courts will have to enter wholeheartedly into the appropriations process and weigh and determine a vast variety of cases.

3. Impossibility of Deciding Without a Policy Determination of a Kind Clearly for Nonjudicial Discretion.

Nothing can be clearer than the fundamentally legislative nature of appropriations decisions. Who shall be funded and who shall not is at the heart of the legislative process. Any judicial appropriation for abortions requires an initial policy decision that something else not be funded. Any judicial order to expend money for abortion puts the federal judiciary squarely in the legislative area. See J. Noonan,*A Private Choice*, 112-117 (1979).

4. Expression of Lack of Respect Due a Coordinate Branch of Government.

Almost a century ago an acute observer of our institutions, James Bryce, wrote: "There remains the power which in free countries has long been regarded as the citadel of parliamentary supremacy, the power of the purse. Congress has the sole right of raising money and appropriating it to the service of the state." *Bryce, The American Commonwealth*, 158 (Macmillan, 1905). It is this citadel which the district court's order has subverted, and this Court is asked to ratify that subversion.

The Majority Leader of the House, Congressman Jim Wright, an *amicus* here, has expressed the deep concern the House has felt at this sudden challenge to its basic power:

> Whatever one's feeling may be as to the social ethics involved, surely the right of Congress to enact a specific limitation on the use of tax moneys for any such purpose is a right long established. It is a right without which Congress could not perform its duty to the American taxpayer.
>
> That right is indispensable to the legislative branch in carrying out its constitutional responsibility, and I trust that the Supreme Court will speedily and decisively reaffirm that right in this case.

126 *Cong. Rec. 1062 (1980). Abortion aside, the lower court ruling treats Congress as the stepchild in our constitutional system.*

5. Unusual Need for Unquestioning Adherence to a Political Decision Already Made.

Here again the words of Madison are of value: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into

effect every just and salutary measure." *The Federalist* No. 58, at 380 (Mod. Lib. Ed.) (J. Madison). The amount of money affected by the district court's order may be estimated, on the basis of earlier experience, as at least $88 million (see *The Washington Post*, February 20, 1980, A 14). If this money is used for the purpose rejected by Congress and required by the court below, less money will be available for needs for which Congress did appropriate. It does not seem to lie within the competence of the judiciary to determine the seriousness of the needs Congress sought to meet — no data on them has been presented in this process. Nor does the judiciary appear to have the competence to determine what needs will then go unmet or to forecast the response of Congress to a judicial redistribution of federal funds.[5] There is an unusual need, therefore, for the judiciary to adhere to the political decision already made as to the appropriation.

A more obvious example of a political question is difficult to imagine. Not one, but five, of Mr. Justice Brennan's criteria are met in the case at bar. Overriding all is his admonition that primarily the doctrine is concerned with the separation of powers. A judicial usurpation of the appropriations power is no less a threat to the separation of powers than would be a usurpation of the militia power, or the war power, or the taxing power. These are simply not powers that were intended for the judiciary. They were intended for the people's most immediate representatives: the Congress of the United States.

The very first words of Article I of our Constitution are: "All Legislative Powers herein granted shall be vested in a Congress of the United States. .." A matter that has been hotly contested within each body of the Congress and between the two bodies, a matter which has been an issue in municipal and state and national legislatures is indisputably legislative, and it is difficult to believe that any issue could be more political. No doubt members of the federal judiciary have strong views as to what the right outcome of the political contest should be. A number of these judges have not concealed their opinions. Members of the judiciary are called, not to further the political cause they think is right, but to respect the foundations of our government of separate and limited powers, of which the power of the purse is democratically entrusted to the Congress.

Conclusion.

For all of the foregoing reasons, it is respectfully requested that the judgment of the district court, violating Article I, Section 9, Clause 7 of the Constitution, violating the principle of separation of powers, and representing an exercise of jurisdiction to resolve a political question contrary to Article III, be reversed.

Notes

1. Senator Jesse Helms, N. C., and Rep. Henry J. Hyde, Ill., 6th District, are not listed as *amici* solely because they are intervenors-appellees.

2. See *Rule XXI, Constitution, Jefferson's Manual and Rules of the House of Representatives*, ed. Deschler, sec. 837.

3. The District Court had also invoked the teaching of Mr. Justice Harlan, concurring in *Welsh* v. *United States*, 398 U. S. 333 (1970), on a court's power to extend the exemptions of a statute. But neither Mr. Justice Harlan in *Welsh*, a case involving exemptions for conscientious objectors, nor this Court in *Wescott*, a case involving an authorization statute with a severability clause, had addressed the appropriations power or contemplated a challenge to the exercise of that power by Congress.

4. L. Fisher, *The Authorization-Appropriations Process: Formal Rules and Informal Practices* (Congressional Research Service, Library of Congress, 1979).

5. The statement of Mr. Justice Stewart is apropos:

"We do not decide today that the Maryland regulation [limiting total amounts allotted to families with dependent children under Title IV of the Social Security Act] is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure. . . . But the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970).

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