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THE CONSTITUTIONALITY OF THE HUMAN LIFE BILL

In 1973, in the companion cases of *Roe v. Wade*¹ and *Doe v. Bolton*,² the Supreme Court held that, under the fourteenth amendment, a woman has a privacy right “to terminate her pregnancy”³ absent the showing of a compelling state interest.⁴ The Court further found that the unborn are not “persons” under the fourteenth amendment⁵ and therefore cannot claim the rights to life, liberty or property as protected therein.⁶ In excluding the unborn from the classification of “persons,” the Court, ironically, never answered the fundamental question of when life begins.⁷ The Court argued that in light of man’s limited knowledge such a determination would be mere judicial speculation.⁸

Criticized by many legal scholars,⁹ *Roe* has been the subject of nu-

1. 410 U.S. 113 (1973).

2. 410 U.S. 179 (1973).

3. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

4. *Id.* at 154.

5. *Id.* at 157-58. The fourteenth amendment provides in pertinent part that no state shall “deprive *any person* of life, liberty or property, without due process of law.” U.S. CONST. amend. XIV, § 1 (emphasis added). The amendment’s enforcement clause further provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” *Id.* at § 5.

6. The Court never recognized the fetus as having any rights per se, presumably because the Court found that the word “person” as used in the fourteenth amendment was not intended to include the unborn. *Roe v. Wade*, 410 U.S. 113, 158 (1973). The state did, nevertheless, have an important interest in safeguarding the “potential life” of the fetus once the fetus had the capability of “meaningful life.” *Id.* at 163. The importance of this interest, however, was qualified by the health of the mother, with consideration given to her age and “physical, emotional, and psychological . . . well being.” *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

7. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

8. Noting the “wide divergence of thinking on this most sensitive and difficult question,” *id.* at 160, the Court reasoned that “the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” *Id.* at 159. The Court did not say that Congress could not speculate, nor did it say that the determination of when life begins would always be beyond man’s knowledge.

9. *See, e.g.*, A. BICKEL, *THE MORALITY OF CONSENT* 27-29 (1975) (expressing “astonishment” that only two dissents were filed in *Roe* and noting that the Court simply asserted “the result it reached,” thus breaking the discipline to which its function is properly subject); A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113-14 (1976) (criticizing the Court for failing to “establish the legitimacy of the decision by not articulating a precept . . . to lift the ruling above the level of political judgment,” a precept the author admittedly could not articulate himself); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 949 (1973) (noting that there is nothing in the Constitution creating a special freedom for abortion and thus the “Court had no business imposing it”); Epstein, *Substantive Due Process by*

merous commentaries and debates, as well as state¹⁰ and federal legislation.¹¹ This Note will address the latter response and will focus specifically on a recent legislative development—the Human Life Bill.¹²

The decision in *Roe* failed to answer two important questions. The

Any Other Name: The Abortion Cases, 1973 SUP. CT. REV. 159, 185 (concluding that state anti-abortion statutes should not be struck down as unconstitutional “particularly in an opinion that avoids . . . the hard questions that must be faced to reach that result.”). See also B. NATHANSON, *ABORTING AMERICA* (1979) (cofounder of what is now the Abortion Rights Action League severely criticizing the taking of unborn life since *Roe v. Wade*).

10. Massachusetts, for example, passed an act which required mothers 18 years old and younger to receive parental consent before procuring an abortion. This statute was found unconstitutional in *Bellotti v. Baird*, 433 U.S. 622 (1979). Missouri enacted a bill defining viability as the stage at which life could be continued by natural or artificial means. This statute also was found unconstitutional by the Court in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

11. For example, since 1976 Congress has acted to limit federal funding of those abortions not endangering the life of the mother or resulting from rape or incest not reported immediately to public authorities. The rider provision enacting these limitations has become known as the Hyde Amendment. Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979) (sustained in *Harris v. McRae*, 448 U.S. 239 (1980)).

12. The bill is currently pending in the Congress. To date, it has only been reported out of the Senate Subcommittee on Separation of Powers. This Note will focus on sections 1 and 2 of this version of the bill. This bill is currently before the Senate Judiciary Committee and provides:

SECTION 1. (a) The Congress finds that the life of each human being begins at conception.

(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.

SEC. 2. Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age, health, defect, or condition of dependency, and for this purpose “person” includes all human beings.

SEC. 3. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the fourteenth amendment, in protecting the lives of those within the State’s jurisdiction whom the State rationally regards as human beings.

SEC. 4. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions: Provided, That nothing in this section shall deprive the Supreme Court of the United States of the authority to render appropriate relief in any case.

SEC. 5. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Act, or of any State law or municipal ordinance that protects the rights of human beings between conception and birth, or which adjudicates the con-

Court determined neither the extent to which a woman might exercise her right to privacy in choosing to abort her pregnancy¹³ nor the relationship between the existence of life and the attachment of "personhood" under the fourteenth amendment.¹⁴

To some extent, subsequent litigation has helped clarify the scope of a woman's privacy right by indicating that a woman does not have an absolute right to an abortion.¹⁵ As the Court emphasized in *Maher v. Roe*,¹⁶ a woman's privacy right can only be understood in reference to both the woman's interest and the nature of the state's obstruction of

stitutionality of this Act, or of any such law or ordinance. The Supreme Court shall advance on its docket and expedite the disposition of any such appeal.

SEC. 6. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.

SUBCOMMITTEE ON SEPARATION OF POWERS, 97TH CONG., 1ST SESS., REPORT ON THE HUMAN LIFE BILL 1-2 (Comm. Print 1981) [hereinafter cited as REPORT ON THE HUMAN LIFE BILL].

13. The Court in *Roe* did state, however, that a woman's right to terminate her pregnancy was not absolute. A woman's right to abort during the first trimester is only conditional on her finding a doctor who believes her pregnancy should be terminated. *Roe v. Wade*, 410 U.S. 113, 163 (1973). This condition only requires that a physician not act against his medical judgment or conscience. During the second trimester the woman, depending on the state, may have to seek a licensed facility. *Id.* After the fetus has reached viability, the woman must find a doctor who believes it in her best interests to have an abortion. *See Doe v. Bolton*, 410 U.S. 179, 192 (1973). The time it takes for a child to reach viability may not be determined by state legislation, *Planned Parenthood v. Danforth*, 428 U.S. 52, 61 (1976), but is left to the discretion of the doctor. *Id.* at 64. This potentially may curtail the woman's right to abort as medical science brings viability closer to conception. *See Comment, Colautti v. Franklin: The Court Questions the Use of "Viability" in Abortion Statutes*, 6 W. ST. U.L. REV. 311, 323 (1979); 52 TEMP. L.Q. 1240, 1259 (1979).

14. Professor Wardle suggested that the Court decided this issue when it said we "need not resolve this difficult question of when life begins." *Roe v. Wade*, 410 U.S. 113, 159 (1973). *See Wardle, A Brief Evaluation of The Constitutionality and Desirability of The Human Life Bill(s)* (1981), reprinted in *The Human Life Bill Appendix: Hearings on S. 158 Before The Subcomm. on Separation of Powers of The Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 84, 86-87 (1981) (memorandum submitted by Professor Lynn D. Wardle). Wardle argued that the Court's decision was whole and complete in itself, independent of the issue of when life begins. Professor Epstein, however, noted that such a conclusion, if indeed it be a conclusion at all, is "clearly wrong if the abortion question has . . . its own irreducible constitutional dimension." Epstein, *supra* note 9, at 182. To say that some human beings may be nonpersons under the law would seem an extreme view to impute to any court.

15. *See Harris v. McRae*, 448 U.S. 239 (1980) (upholding congressional restrictions on federally funded abortions); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding a public hospital's decision not to perform nontherapeutic abortion even though it handled pregnancies); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding a congressional act severely restricting federally funded abortions); *Beal v. Doe*, 432 U.S. 438 (1977) (interpreting the federal Social Security Act to allow a state to choose to withhold funds for nontherapeutic abortions when the state funded pregnancies and medically necessary abortions). *See generally* 59 WASH. U.L.Q. 247 (1981).

16. 432 U.S. 464 (1977).

it.¹⁷ While a state may not impose criminal sanctions for procuring an abortion,¹⁸ the Constitution imposes no obligation on the state to provide public funding for abortion.¹⁹

Unlike the privacy issue, the Court has shed little light on the nexus between "personhood" and the inception of life.²⁰ Aware of this judicial abeyance, Congress has taken the initiative.²¹

Congress has made several attempts to limit the effect of the Court's decision in *Roe v. Wade*. One result has been the abatement of federally funded abortions, with limited exceptions.²² Nevertheless, the annual number of abortions procured in the United States continues to rise.²³ To curtail the climbing number of abortions, Congress has also considered a "human life federalism amendment."²⁴ This amendment would vest Congress and the states with the concurrent power to determine a uniform standard for the regulation of abortion on a national level.²⁵ Many proponents of a constitutional amendment, however, have recognized the extraordinary consensus and the lengthy ratification effort involved in amending the Constitution.²⁶ As an alternate

17. *Id.* at 473. The Court noted that there is a fundamental difference between direct state interference with a constitutional right and state encouragement of an alternative activity compatible with legislative policy. *Id.* at 475.

18. *Id.* at 472.

19. *Id.* at 469.

20. See REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 2-7 (noting that the issue of when life begins has yet to be resolved by the Court).

21. *Id.*

22. See *supra* note 11.

23. In 1979, 1.2 million abortions were procured in the United States, an increase of 7% over the number in 1978, and an increase of 14% over the number in 1977. U.S. DEPT. OF HEALTH AND HUMAN SERVICES/PUBLIC HEALTH SERVICES, ANNUAL SUMMARY 1979 OF MORBIDITY AND MORTALITY IN U.S. 103 (1979).

24. This amendment is more commonly known as the Hatch Amendment. It provides: "A right to abortion is not secured by this Constitution. The Congress and the several States have the concurrent power to restrict and prohibit abortions: *Provided*, That a law of a State which is more restrictive than a law of Congress shall govern." S. J. Res. 110, 97th Cong., 1st Sess., 127 CONG. REC. 510,198 (1981).

25. See *supra* note 24.

26. To date, Congress has approved only 33 of the more than 10,000 amendments it has considered; only 26 have ever been ratified, including the Bill of Rights. See Wechsler, *The Courts And The Constitution*, 65 COLUM. L. REV. 1001, 1004 (1965). For an amendment to pass through the Senate alone, 67 out of 100 members would have to approve its passage. U.S. CONST., art. V. One political analyst notes that there are presently at least 43 senators who are opposed to a constitutional amendment. Ward, *Avoiding a Pro-Life Dunkirk in Congress*, NEW LIFE 6 (Oct. 1981). He concludes that there is very little chance for an amendment's passage in the near future. *Id.*

measure, Congress may consider drawing upon its authority to enforce the provisions of the fourteenth amendment, described as “a vast untapped reservoir of federal legislative power,”²⁷ and adopt the Human Life Bill.²⁸

The Bill is a direct congressional response to the Court’s admitted inability to resolve the threshold issue of when life begins.²⁹ On the basis of the Senate subcommittee hearings,³⁰ the proposed Bill suggests three findings:³¹ first, that the biological life of a human being³² originates at conception;³³ second, that regardless of the period of gestation,³⁴ every human life has intrinsic worth and is of equal value;³⁵ and third, for purposes of enforcing the fourteenth amendment, “personhood” extends to all human beings.³⁶

A statute such as the Human Life Bill could have a profound influence on the Court’s continued adherence to its rulings in *Roe*.³⁷ The remainder of this Note will evaluate the extent of congressional power to enact the Human Life Bill despite the Supreme Court’s rulings in

27. Cox, *The Supreme Court, 1965 Term—Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 98-99 (1966).

28. See Galebach, *A Human Life Statute*, 7 HUMAN LIFE REV. 5, 5 (1981) (an amendment affords the surest protection, but in the meantime Congress should act); Interview with Prof. Charles E. Rice, reprinted in THE WANDERER 4 (July 23, 1981) (arguing that a Human Life Bill is not inconsistent with an amendment and that should the Supreme Court declare it unconstitutional, strong support for the prompt enactment of a Human Life Amendment might emerge).

29. See *Roe v. Wade*, 410 U.S. 113, 159 (1973). Professor Uddo suggested that the Court’s failure to resolve the issue of when life begins not only precluded its recognition of the unborn as persons but potentially diminished the scope of protection afforded by the fourteenth amendment to those already born. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 352-53 (1981) (testimony of Professor Basile J. Uddo) [hereinafter cited as *Hearings on S. 158*].

30. *Hearings on S. 158*, *supra* note 29.

31. REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 3.

32. A human being, as referred to in the subcommittee report, means “a being that is alive and is a member of the human species.” *Id.* at 7.

33. *Id.* at 7-13.

34. “Gestation” is defined as “the time during which a woman carries a fetus in her womb, from conception to birth.” BLACK’S LAW DICTIONARY 618 (5th ed. 1979).

35. REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 13-18.

36. *Id.* at 20-29.

37. If the principles of judicial supremacy, the balance and separation of powers, and judicial independence do not become the prevailing issues, see Wardle, *supra* note 14, at 86-87 (suggesting passage of a bill making the simple finding that human life begins at conception to avoid the judicial supremacy issue), the inadequacy of Justice Blackmun’s opinion in *Roe* would become obvious. The Court would be left to decide whether all human life is deserving of constitutional protection, a decision the Court skirted in *Roe*.

Roe.³⁸ This Note first examines the degree of authority the fourteenth amendment vests in Congress to enforce its provisions.³⁹ Second, it analyzes a series of cases in which the Court has deferred to congressional determinations involving the fourteenth amendment despite prior conflicting judicial rulings.⁴⁰ Third, the Note discusses two theories that attempt to explain the Court's submission to legislative findings in these cases.⁴¹ Finally, the Note concludes that the Human Life Bill is a valid exercise of the congressional enforcement power entitled to judicial deference under either theory.⁴²

I. CONGRESSIONAL POWER UNDER THE ENFORCEMENT CLAUSE

The source of congressional authority to enact the Human Life Bill is section 5 of the fourteenth amendment.⁴³ This section confers on Congress the power to enforce provisions of the amendment through "appropriate legislation."⁴⁴ Section 1 declares that no state shall take the life of any person without due process of law.⁴⁵ Congressional adoption of the Human Life Bill would support this directive.⁴⁶

In the past the Court has recognized the expansive power vested in Congress to enforce the fourteenth amendment⁴⁷ and has upheld legislative initiatives arguably contrary to prior Court holdings.⁴⁸ As early as 1879, the Court noted that the strength of the thirteenth and fourteenth amendments derived from the congressional enforcement power.⁴⁹ The amendments specifically enlarged the power of Congress, not the power of the judiciary.⁵⁰ This conception of congressional en-

38. 410 U.S. 113 (1973). With respect to the Human Life Bill, two fundamental issues are presented. First, does a Supreme Court ruling on a subject preclude a congressional determination to the contrary? Second, should the Court defer to opposing congressional conclusions?

39. See *infra* notes 43-65 and accompanying text.

40. See *infra* notes 66-118 and accompanying text.

41. See *infra* notes 132-61 & 188-202 and accompanying text.

42. See *infra* notes 162-87 & 204-07 and accompanying text.

43. See *supra* note 5; REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at § 2.

44. See *supra* note 5.

45. *Id.*

46. The express purpose of the Human Life Bill is to ensure that all human life is protected. See *supra* notes 32-36 and accompanying text.

47. See *infra* notes 49-58 & 94-99 and accompanying text.

48. See *infra* notes 66-120 and accompanying text.

49. *Ex parte Virginia*, 100 U.S. 339, 344-45 (1879).

50. *Id.* The Court stated, "[i]t is not said the *judicial power* . . . shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged." *Id.* (emphasis added). Professor Franz has added:

forcement power has persisted through the years.⁵¹

In two recent decisions, *City of Rome v. United States*⁵² and *Fullilove v. Klutznick*,⁵³ the Court reiterated the broad scope of congressional enforcement power. The Court equated it with the enforcement authority under the necessary and proper clause,⁵⁴ generally viewed as one of the most expansive sources of power in the Constitution.⁵⁵ The Court determined that the legislation required to protect fourteenth amendment rights generally lies within the discretion of Congress.⁵⁶

The Court's understanding of what legislation is appropriate in enforcing the provisions of the fourteenth amendment has been equally generous. Contemporary courts subject legislation to the rationality standard formulated by Chief Justice Marshall in *McCulloch v. Maryland*:⁵⁷ "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the

[I]t is reasonable to infer that not only in the Congress, but in the ratifying legislatures and amongst the voters who elected the ratifying legislatures, the fourteenth amendment was widely thought of as something which would empower the Congress to deal effectively with the situation depicted in the [congressional committee] testimony.

Furthermore, the framers and backers of the fourteenth amendment were primarily interested in enlarging the powers of Congress, not those of the federal judiciary, which was looked upon with considerable distrust.

Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L. REV. 1353, 1355-56 (1964).

The thirteenth, fourteenth, and fifteenth amendments' enforcement clauses empower Congress to enforce the amendments by appropriate legislation. U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

51. See *infra* notes 52-56 & 92-99 and accompanying text.

52. 446 U.S. 156 (1980). See *infra* note 202.

53. 448 U.S. 448 (1980). See *infra* note 202.

54. *Fullilove v. Klutznick*, 448 U.S. 448, 476-77 (1980) (discussing enforcement power under § 5 of fourteenth amendment); *City of Rome v. United States*, 446 U.S. 156, 174-75 (discussing enforcement power under § 2 of fifteenth amendment). The necessary and proper clause provides that Congress shall have powers "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." U.S. CONST., art. I, § 8, cl. 18.

55. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall described the power conferred on Congress by the necessary and proper clause of article I: "1st, the clause is placed among the powers of Congress, not among the limitations on those powers. 2nd, its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." *Id.* at 419-20. See generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 92-112 (10th ed. 1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 227-31 (1978).

56. *Fullilove v. Klutznick*, 448 U.S. 448, 476-77 (1980).

57. 17 U.S. (4 Wheat.) 316 (1819).

letter and spirit of the constitution, are constitutional.”⁵⁸

Prior to *Roe v. Wade*, the congressional enforcement power would have permitted the enactment of a “human life bill.” Had Congress sought to intercede on behalf of any individual whose life was jeopardized by state action, it would have been necessary to determine whether there was any existent life to protect,⁵⁹ and, if so, whether the life of that individual deserved protection.⁶⁰ Congressional action to prevent the termination of protected life would have been “plainly adapted” to the congressional duty to prevent the taking of any individual’s life without due process of law.⁶¹

Notwithstanding the apparently wide latitude Congress has in preventing the arbitrary taking of human life, the propriety of the Human Life Bill may be questionable if it conflicts with the opinion of the judiciary, a coequal branch of the government. This conflict arises if the legislation both protects a class of individuals that the Court does not consider to be within the protection of the Constitution⁶² and infringes upon a judicially recognized fundamental right of a second party.⁶³ The Congress and the Court, however, have been in discord before, and congressional power to legislate under the enforcement clause has not appeared dependent upon which branch encountered the issue first.⁶⁴ Indeed, the Court has exhibited an increasingly deferential

58. *Id.* at 421. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 476-77 (1980). See also *City of Rome v. United States*, 446 U.S. 156, 175 (1980).

59. If there were no life, Congress would not have any justifiable interest in protecting the entity under the fourteenth amendment. If Congress found that there was life to protect and enacted legislation to do so, and if the action was challenged as beyond congressional power, the Court would have to explore the facts underlying the issues. See *Napue v. Illinois*, 360 U.S. 264, 272 (1959) (“duty rests on [the] Court to decide for itself facts or constructions upon which federal constitutional issues rest”) (quoting *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954)). See also Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 813-14 (1973).

60. This value question can only be considered after an affirmative determination that there is life present to value. See *infra* notes 208-31 and accompanying text.

61. See *supra* note 5.

62. This was the obvious consequence of the Court’s holding that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn,” *Roe v. Wade*, 410 U.S. 113, 158 (1973), coupled with its later statement that “[i]f the State [were] interested in protecting fetal life,” it could regulate abortions after viability. *Id.* at 163-64 (emphasis added). See *REPORT ON THE HUMAN LIFE BILL*, *supra* note 12, at 2-7. Compare *supra* notes 4-5 and accompanying text with *REPORT ON THE HUMAN LIFE BILL*, *supra* note 12, at §§ 1(b), 2.

63. See *infra* note 231.

64. See Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 *STAN. L. REV.* 603, 618-19 (1975). Because the Court has encountered particular issues prior to Congress

approach to contrary congressional views.⁶⁵

II. JUDICIAL DEFERENCE TO CONGRESSIONAL ENFORCEMENT POWER

The cases that best demonstrate judicial submission to congressional findings in conflict with prior judicial declarations primarily concern the 1965 Voting Rights Act.⁶⁶ Invoking its enforcement power, Congress passed the Act and effectively disregarded two prior Court decisions: the *Civil Rights Cases*⁶⁷ and *Lassiter v. Northampton Board of Elections*.⁶⁸

In the *Civil Rights Cases*,⁶⁹ the Supreme Court considered the constitutionality of two provisions of the 1875 Civil Rights Act.⁷⁰ These sections provided for the nondiscriminatory use of any facility, including those privately held, that catered to the general public.⁷¹ In ruling that Congress had acted beyond the scope of its enforcement power under both the thirteenth and fourteenth amendments,⁷² the Court established the principle that Congress' fourteenth amendment enforcement power is limited to enjoining those actions adjudged unconstitutional by the Court.⁷³

In *Lassiter v. Northampton Board of Elections*⁷⁴ the Supreme Court upheld North Carolina's voting registration requirement that a voter

having an opportunity to do so has not affected the Court's serious consideration of congressional conclusions contrary to those of the Court. See *infra* notes 66-118 and accompanying text.

65. The Court has recognized the authority and unique ability of Congress to aid the Court in securing the guarantees of the fourteenth amendment. See Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79; Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81. See also *infra* notes 66-145 and accompanying text.

66. 42 U.S.C. §§ 1971, 1973 to 1973(p) (1976).

67. 109 U.S. 3 (1883).

68. 360 U.S. 45 (1959).

69. 109 U.S. 3 (1883).

70. Civil Rights Act of 1875, ch. 114, §§ 1, 2, 18 Stat. 335-36 (1875).

71. Section 2 specifically provided for the levying of fines on those who violated the act. *Id.* at § 2.

72. The enforcement clauses of each amendment are identical. See *supra* note 5; U.S. CONST. amend. XIII, § 2.

73. 109 U.S. at 18-19. In holding these sections unconstitutional under the fourteenth amendment, the Court noted that Congress' section 5 power extended only to enacting remedies for "correcting the effects of . . . prohibited state laws and state Acts, and thus render them effectually null, void and innocuous." *Id.* at 11. It remained the judiciary's task to decide what activities violated constitutional rights. See Note, *Congressional Power to Enforce Due Access Rights*, 80 COLUM. L. REV. 1265 (1980).

74. 360 U.S. 45 (1959).

pass a literacy test.⁷⁵ A unanimous Court, while recognizing the constitutionally guaranteed right to suffrage,⁷⁶ held the right subject to non-discriminatory state regulation.⁷⁷ A neutral standard such as literacy⁷⁸ was not, in and of itself, an invalid device for raising voting standards.⁷⁹ Rather, only evidence indicating a clear discriminatory impact could condemn such tests as an unconstitutional infringement upon the right to vote.⁸⁰

Despite the judicial authorization in *Lassiter* to implement literacy tests in a nondiscriminatory manner,⁸¹ and the pronouncement in the *Civil Rights Cases* limiting Congress' fourteenth amendment enforcement power to enjoining those actions adjudged unconstitutional by the Court,⁸² Congress passed the 1965 Voting Rights Act.⁸³ The Act mandated both the suspension of literacy tests in any area where fewer than fifty percent of the voting age residents were registered⁸⁴ and the enfranchisement of anyone of voting age who had successfully completed the sixth grade.⁸⁵

In *Katzenbach v. Morgan*,⁸⁶ a case challenging section 4(e) of the

75. The registration requirement was challenged as a violation of the fourteenth and fifteenth amendments. See *supra* note 5; U.S. CONST. amend. XV, § 2.

76. 360 U.S. at 51.

77. *Id.*

78. The Court believed literacy to be "neutral on race, creed, color, and sex." *Id.*

79. *Id.* at 52-54.

80. *Id.*

81. See *supra* notes 74-80 and accompanying text.

82. See *supra* note 73 and accompanying text.

83. 42 U.S.C. §§ 1971, 1973 to 1973(p) (1976).

84. Sections 4(a)-(d) of the Act authorized the United States Attorney General to suspend all literacy tests for five years if it was determined that such a device had been used and less than 50% of its voting age residents were registered. 42 U.S.C. § 1973 4(a)-(d) (1976).

85. Section 4(e) prohibited the testing of literacy as a prerequisite to voter registration if the potential registrant had successfully completed the sixth grade in an American school, regardless of the language spoken at the school. The only state affected by the Act was New York, where numerous Puerto Ricans who attended Spanish speaking schools were unable to register because of failure to pass an English literacy test. *Id.* § 1973 4(e).

86. 384 U.S. 641 (1966). In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court first examined the constitutionality of the Act's "fifty percent" provision by specifically considering the scope of congressional enforcement power under the fifteenth amendment. *Id.* at 324-37. The Court found Congress' fifteenth amendment enforcement power identical to that under the fourteenth amendment. See *supra* notes 50-55 and accompanying text. Congress had compiled evidence indicating the discriminatory application of literacy tests in many regions, thus fulfilling the *Lassiter* discriminatory impact requirement. 383 U.S. at 308-09, 333-34. See *supra* notes 74-80 and accompanying text. In considering congressional authority to enact such legislation under the enforcement clause, the Court applied the deferential rational relationship test employed under

1965 Voting Rights Act,⁸⁷ the Court implied that Congress might delineate the substantive scope of the Constitution independent of the judiciary. Section 4(e) prohibited anyone who had successfully completed the sixth grade in an American school from being disqualified from voting on the basis of a literacy test.⁸⁸ Unlike previously disputed sections of the Act,⁸⁹ which were upheld on the basis of an imposing wealth of evidence,⁹⁰ the Court in *Morgan* produced no factual data

the necessary and proper clause. 383 U.S. at 326. *See supra* notes 54-58 and accompanying text. The Court, however, in holding the 50% formula rational and appropriate, 383 U.S. at 326-27, approved a congressional inference that such a discriminatory use was likely in areas where no evidence had been prepared. The state has the burden to prove that there was no voting discrimination in those areas. *Id.* at 330. The Court emphasized the remedial nature of the legislative decision to protect the right to vote, *id.* at 326-30, a policy choice clearly within the power of the legislature. *See L. TRIBE, supra* note 55, at 265. Nevertheless, the Court's recognition of congressional authority to proscribe state practices that were only likely to infringe upon constitutional rights, without any absolute proof, represented a departure from its holding in *Lassiter*.

Although *South Carolina v. Katzenbach* was not constitutionally significant because it focused on remedial congressional action, the Court's broad language in discussing the enforcement power raised the question of the extent to which Congress might alter prior judicial holdings concerning more substantive matters. *See Killian, A Federal Statutory Protection for Privacy Rights*, in CONG. RESEARCH SERVICES 53-54 (July 11, 1978). One authority has commented that "[t]he intent was obviously to rationalize the holding to precedents in which remedial legislation found appropriate had been sustained. But a reading of the Act and of *South Carolina v. Katzenbach* indicates that the Act did go further than earlier civil rights law and cannot be deemed merely 'remedial.'" Killian, *supra*, at 53-54.

The Court rejected South Carolina's contention that Congress was limited to forbidding fifteenth amendment violations using general terms, and its claim that the task of applying specific remedies to particular localities was the job of the courts. 383 U.S. at 327. *But see* Freud, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 47, 48 (E. Cahn ed. 1954) (if legislation is particularized it approaches judicial arena). Although the Act was admittedly an "inventive" exercise of Congress' enforcement power, 383 U.S. at 327, the Court refused to "circumscribe [Congress] by such artificial rules." *Id.* Declaring that "[t]he basic test to be applied in a case involving section 2 of the Fifteenth Amendment [was] the same as in all cases concerning the express powers of Congress . . .," *id.* at 326, the Court cited Chief Justice Marshall's rational relationship test, *see supra* notes 57-58 and accompanying text, as the applicable standard. 383 U.S. at 326.

87. 42 U.S.C. § 1973 4(e) (1976). Congressional reliance on its enforcement power under the fourteenth amendment was clearly indicated in the preamble to section 4(e):

Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

Id.

88. *See supra* note 85.

89. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *supra* note 86.

90. *See supra* note 86.

whatsoever to support Congress' action.⁹¹

Despite its previous ruling in *Lassiter* that at least some evidence of a discriminatory impact must be established to prohibit literacy tests,⁹² the *Morgan* Court refused to find section 4(e) of the Act unconstitutional.⁹³ The Court's rationale emphasized the congressional obligation to enforce the provisions of the fourteenth amendment independently from the judiciary.⁹⁴ Whether or not the Court would have found the state's literacy requirement in violation of the Constitution was irrelevant.⁹⁵ The sole issue before the Court was whether Congress had acted within the limits of the amendment's enforcement clause.⁹⁶ To this end, Congress had only to meet the lenient rationality standard applied under the necessary and proper clause.⁹⁷ The balancing of the state's interest in maintaining certain voting standards, the availability of alternative remedies, and the risk of discrimination were all within the ambit of congressional authority.⁹⁸ Congress' resolution of the voting issue, therefore, was not subject to judicial circumvention because the resulting legislation was "plainly adapted" to the amendment's enforcement.⁹⁹

91. Section 4(e) was introduced as a floor amendment and was limited to a one-hour debate on the Senate floor. 111 CONG. REC. 11,027-28, 11,060-74, 28,368 (1965). There were no hearings held.

92. See *supra* notes 74-80 and accompanying text.

93. 384 U.S. at 648, 658. The Attorney General of New York argued that Congress could only act if the judiciary decided that the application of the literacy tests were violative of the fourteenth amendment. *Id.* at 648. The Court firmly rejected this idea as too confining. *Id.* See *infra* note 95.

94. 384 U.S. at 648. See *supra* notes 49-50 and accompanying text.

95. See 384 U.S. at 649. The Court's holding was a marked departure from previous decisions that limited Congress to prohibiting only those practices declared unconstitutional by the Court. See Civil Rights Cases, 100 U.S. 3, 18 (1883); *supra* note 73 and accompanying text. The *Morgan* Court refused to confine Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." 384 U.S. at 649. The Court thought it necessary to allow Congress to legislate without the need for "a judicial determination that the enforcement of the state law precluded by Congress violated the [Constitution]." *Id.* at 648.

96. Justice Brennan, writing for the Court, framed the issue as follows: "Without regard to whether the judiciary would find that the Equal Protection Clause [had been violated], could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?" 384 U.S. at 649.

97. *Id.* at 651. See *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *supra* notes 57-58 and accompanying text & note 86.

98. 384 U.S. at 653.

99. *Id.* Commentators have attempted to explain Congress' enforcement power under the fourteenth amendment. Professor Burt, for example, has described Congress' power as "filling in

In *Oregon v. Mitchell*,¹⁰⁰ the Court clearly departed from the *Lassiter* decision.¹⁰¹ The case focused on a series of amendments to the 1965 Voting Rights Act,¹⁰² and the Court again confronted the issue of congressional power under the enforcement clause.¹⁰³ This time a unanimous Court, including Justices Harlan and Stewart,¹⁰⁴ who had refused to sustain similar legislation in *Morgan*,¹⁰⁵ upheld the congressional power to suspend the use of all literacy tests nationwide.¹⁰⁶ All of the justices were convinced that the substantial evidence before Congress provided a sufficient basis from which Congress could rationally conclude that literacy tests lent themselves to discriminatory application.¹⁰⁷

the blanks" when the Court has set the basic standards. See Burt, *supra* note 65, at 115. Similarly, Professor Monaghan has suggested that Congress may "fine tune" those judicial holdings that the Court, limited to considering the particular facts of the case at hand, is unable to do. See Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975). Professor Sager believes Congress may legislate only when judicial restraints have prevented the Court from expanding the constitutional norms enunciated by the Court. See Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1239-42 (1978). Professor Cohen takes a more limited view, restricting congressional action to those areas in which a state legislature would be competent to act. In those cases, he argues that deference should be paid to congressional judgment due to its superior competence in balancing national and state interests. See Cohen, *supra* note 64, at 614. See generally Note, *supra* note 73, at 1273 n.49 (1980).

100. 400 U.S. 112 (1970).

101. 360 U.S. 45 (1959). See generally *supra* notes 74-80 and accompanying text.

102. The Court considered the constitutionality of Titles II and III of the Voting Rights Act Amendments of 1970. Pub. L. No. 91-285, 84 Stat. 314 (1970). Title II placed an absolute ban on the use of literacy tests as a device for securing the right to vote. *Id.* at 315. Title III proposed to reduce the voting age from 21 to 18 years of age for both federal and state elections. *Id.* at 318.

103. See 400 U.S. at 126-30.

104. *Id.* at 152 (Harlan, J., concurring in part and dissenting in part); *id.* at 281 (Stewart, J., concurring in part and dissenting in part).

105. 384 U.S. at 659 (Harlan, J., dissenting). The legislation was similar insofar as both banned the use of literacy tests; section 4(e) prohibited their use where the applicant had passed the sixth grade, see *supra* note 85, and Title II prohibited their use altogether. See *supra* note 102.

106. 400 U.S. at 152, 216-18 (Harlan, J., concurring in part and dissenting in part); *id.* at 281, 282-84 (Stewart, J., concurring in part and dissenting in part). Both justices were convinced that "[d]espite the lack of evidence of specific instances of discriminatory application," *id.* at 216, there was sufficient proof, *id.* at 216 n.16, 283, for Congress to rationally conclude that literacy tests lent themselves to discriminatory application. *Id.* at 217, 283.

In light of this more deferential analysis, it is arguable that the dissenting opinions of Harlan and Stewart in *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966), were ostensibly based on the lack of factual support for Congress' actions. See Cohen, *supra* note 64, at 608. When factual data is gathered demonstrating a danger of a constitutional violation, the Court will take a more deferential approach. See 400 U.S. at 216, 283-84; *Katzenbach v. Morgan*, 384 U.S. at 659, 668 (Harlan, J., dissenting).

107. Although the Court split over Congress' power to reduce the voting age, it was unanimous in recognizing the congressional power to ban the use of literacy tests. 400 U.S. at 118

This decision implied that the use of literacy tests was discriminatory by nature,¹⁰⁸ an apparent retraction of the Court's holding in *Lassiter*.¹⁰⁹ Thus, the principle established in the *Civil Rights Cases*,¹¹⁰ limiting congressional fourteenth amendment enforcement power to remedying those practices found unconstitutional by the Court,¹¹¹ was finally abandoned.¹¹²

(Black, J., announcing the judgments of the Court in an opinion expressing his own view of the case), 144-47 (Douglas, J., concurring in part and dissenting in part), 280 (Harlan, J., concurring in part and dissenting in part), 231-36 (Brennan, J., concurring in part and dissenting in part), 281-84 (Stewart, J., concurring in part and dissenting in part).

The Court's handling of Title III of the Voting Rights Act Amendment of 1970 was of less clear significance. In what has been described as a "constitutional law disaster area," see Cohen, *supra* note 64, at 139, the *Mitchell* Court approved the congressional power to reduce the voting age in federal elections but rejected it in the case of state elections.

Five opinions were written, none of which commanded a majority of the Court's support. Justice Brennan, with whom Justices Marshall and White concurred, argued in favor of Title III's validity as a whole. 400 U.S. at 229 (Brennan, J., concurring in part and dissenting in part). The nexus between age limits and the state interest in furthering intelligent and responsible voting, *id.* at 242, was a factual issue. *Id.* at 249. Congress, being better suited to handle complex factual questions, *id.* at 248, is entitled to deference except when its findings are "arbitrary," "irrational," or "unreasonable." *Id.* From his opinion, it is not clear whether Justice Brennan would defer to congressional determinations recognizing "fundamental rights" or "suspect classifications." See *id.* at 247 n.30; Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 508 (1974).

Justice Stewart, with whom Chief Justice Burger and Justice Blackmun concurred, argued that *Morgan's* articulation of Congress' enforcement power was limited to imposing remedies which "elaborated upon the direct command of the Constitution," 400 U.S. at 296 (Stewart, J., concurring in part and dissenting in part), or in "overrid[ing] state laws [where] they were in fact used as instruments of invidious discrimination. . . ." *Id.* This should not be construed to give Congress the power to "determine as a matter of substantive constitutional law what situations fall within the ambit" of the equal protection clause, *id.*, and "what state interests are 'compelling.'" *Id.*

Justice Harlan, agreeing with Justice Stewart's conclusion, expressed the view that the fourteenth amendment did not apply to voting rights. *Id.* at 200 (Harlan, J., concurring in part and dissenting in part). Furthermore, it was "fundamentally out of keeping with the constitutional structures," to give Congress a "final say on matters of constitutional interpretation." *Id.* at 205.

With Justice Douglas filing an opinion in support of the validity of Section III as a whole, *id.* at 135 (Douglas, J., concurring in part and dissenting in part), Justice Black cast the swing vote. *Id.* at 117. Justice Black argued that Congress had the power to change the voting age in federal elections, *id.* at 117-18, but that the states had the reserved power to establish voter qualification standards for their own elections. *Id.* Congress could intervene only in those cases where there was evidence of discrimination. *Id.* at 127-28.

108. Galebach, *supra* note 28, at 14.

109. See *supra* notes 78-79 and accompanying text.

110. 109 U.S. 3 (1883).

111. See *id.* at 18; *supra* note 73 and accompanying text.

112. The original shift occurred in *Morgan* when the Court stated that it was unnecessary for the Court to find the act unconstitutional. 384 U.S. at 648. See *supra* notes 94-95 and accompanying text. In *Oregon v. Mitchell*, 400 U.S. 112 (1966), Justice Black noted the wide range of factual

The Court, shortly after *Morgan*, again limited the *Civil Rights Cases* by abandoning the doctrine that prohibited Congress from proscribing private actions affecting fourteenth amendment rights and privileges.¹¹³ In *United States v. Guest*,¹¹⁴ the defendants challenged the congressional enforcement power to prohibit private conspiracies that did not reflect state involvement.¹¹⁵ Under the statute, no state involvement was required for prosecution.¹¹⁶ In upholding the statute, six concurring justices¹¹⁷ supported the extension of congressional enforcement power beyond the holding of the *Civil Rights Cases*.¹¹⁸

data upon which Congress could rely in order to conclude that literacy tests were being used discriminatorily, *id.* at 132-34. Evidence of specific tests being used discriminatorily in Arizona or Idaho, two parties challenging Title II, was not cited by the Court. This arguably foreclosed the Court's finding, on its own, that these states' use of the test was unconstitutional. *See supra* notes 75-80 and accompanying text.

113. 109 U.S. 3, 11 (1883). Courts had consistently held that the fourteenth amendment did not reach private action. *Id.* at 12-13. Based on these prior decisions, the Court found that sections 1 and 2 of the Civil Rights Act of 1875, which prohibited private discrimination, exceeded the congressional enforcement power. *Id.* at 11.

114. 383 U.S. 745 (1966).

115. 18 U.S.C. § 241 (1964). The statute provided in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise . . . of any right or privilege secured to him by the Constitution or laws of the United States . . . [they shall be fined not more than \$5,000 or imprisoned not more than ten years or both.

Id.

116. *See supra* note 115.

117. Writing for the Court, Justice Stewart found a peripheral participation by the State in a conspiracy to arrest blacks by means of falsified criminal reports. 383 U.S. at 755-56.

Justice Clark, writing for himself and Justices Black and Fortas, believed that section 5 empowered Congress to punish all conspiracies regardless of state involvement. *Id.* at 761, 762 (Clark, J., concurring).

Justice Brennan, writing for himself and Chief Justice Warren and Justice Douglas, argued that any conspiracies interfering with fourteenth amendment rights were within Congress' power to proscribe. *Id.* at 774, 782 (Brennan, J., concurring in part and dissenting in part).

118. Justice Brennan stated that limiting the congressional enforcement power to remedying unconstitutional state action would "[reduce] the legislative power to enforce the provisions of the Amendment to that of the judiciary . . . and . . . [attribute] a far too limited objective to the Amendment's sponsors." *Id.* at 783 (Brennan, J., concurring in part and dissenting in part) (footnotes omitted). Justice Brennan went on to recall Chief Justice Marshall's formulation in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), of the rationality standard now applied to Congress' enforcement power. 383 U.S. at 783-84. *See supra* notes 57-58 and accompanying text.

Professor Cox expressed support for this interpretation of Congress' fourteenth amendment power. *See Cox, supra* note 27, at 117. *See also Cox, The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 242 (1971) (common sense and analogies in the legal system give ample grounds for concluding Congress need not distinguish between state and private action) [hereinafter cited as *Constitutional Determinations*]. *But see Note, Fourteenth Amendment Congressional Power to Legislate Against Private Discriminations: The Guest Case*, 52

III. WILL *MORGAN* ALLOW CONGRESSIONAL EXTENSION OF “PERSONHOOD” TO THE UNBORN?: THE DEFERENTIAL AND EMPIRICAL APPROACHES

In *Roe v. Wade*,¹¹⁹ the Court decided that, for purposes of the fourteenth amendment, the unborn at any stage of development were not “persons” deserving of the law’s protection.¹²⁰ In reaching its decision, the Court made two significant observations. First, if the fetus’ “personhood” under the fourteenth amendment were established, the woman’s case would collapse, for the amendment would then specifically guarantee the fetus’ right to life.¹²¹ Second, because man’s knowledge had not developed to the degree that a consensus could be reached as to when life begins,¹²² the Court was in no position to provide an answer.¹²³ Without resolving the fundamental question of when life begins,¹²⁴ the Court understandably was unable to include the unborn in the amendment’s protected classification of “person.” In the Court’s view,¹²⁵ a fetus is merely a “theory of life” which, at viability, turns into a “potential of life.”¹²⁶ Exercising its enforcement power,¹²⁷ Congress

CORNELL L. Q. 586, 589 (1967) (fourteenth amendment directed only at state action); Comment, *Constitutional and Jurisdictional Problems in the Application of 42 U.S.C. § 1985(3)*, 52 B.U.L. REV. 599, 613 (1972) (state involvement required to implicate fourteenth amendment rights).

119. 410 U.S. 113 (1973).

120. *Id.* at 157-58.

121. *Id.* at 156-57.

122. *Id.* at 159. The Court did not preclude the possibility of man’s acquiring the knowledge. See *supra* note 8.

The suggestion that a consensus is needed, or even relevant, for the existence of a right seems repugnant to the concept of a constitution. Indeed the Court itself has said, “[o]ne’s right to life . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

123. 410 U.S. at 159. The Court only disqualified itself, not Congress. See *supra* note 8.

124. REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 4; Galebach, *supra* note 28, at 6. See Byrn, *supra* note 59, at 813-14. But see Wardle, *supra* note 14.

125. The jurisprudential problems with the Court’s treatment of when life begins raises many questions about how far the Court can go in defining what is and what is not protected by the Constitution. See J. NOONAN, A PRIVATE CHOICE 13-19 (1979).

126. The Court has forbidden states from adopting “one theory of life. . . .” 410 U.S. at 162. Professor Epstein asked whether there is anything prior to viability but potential life. Epstein, *supra* note 11, at 182. Representative Hyde suggested that there is no such thing as a “potentially” living organism. It is either living or it is not, but “[i]f it is alive, it is what its nature is, even though it is incomplete in its functional development.” It may possess “great potentiality but is not itself potential life.” Thus, an individual whose potential has yet to reach complete fruition “is no less a person because its functions are, as yet, undeveloped. . . .” Hyde, *The Human Life Bill: Some Issues and Answers*, 8 HUMAN LIFE REV. 6, 12-13 (1982) (emphasis in original). See generally R. JOYCE, NEW PERSPECTIVES ON ABORTION (1981).

is considering the Human Life Bill¹²⁸ as a legislative response to the Court's refusal to resolve the issue of when life begins and its relationship to "personhood" under the fourteenth amendment.¹²⁹

The extent of congressional power to enforce the fourteenth amendment's due process clause and to pass the Human Life Bill hinges, in large part, upon how *Katzenbach v. Morgan*¹³⁰ is construed. Commentators, along with various members of the Court, have posited a number of theories explaining Congress' role in enforcing the fourteenth amendment.¹³¹ The remainder of this Note will focus primarily on two of these theories, with specific reference to Congress' authority to enact the Human Life Bill.

A. *The Deferential Approach*

The more expansive theory extrapolated from *Morgan* confers on Congress a plenary grant of legislative authority.¹³² Congress is free to create statutory rights and privileges provided they reflect the substantive values of the fourteenth amendment.¹³³ Neither prior judicial holdings¹³⁴ nor the absence of factual evidence¹³⁵ will necessarily present an insuperable barrier to legislative protection of fourteenth amendment liberties.¹³⁶ Otherwise, Congress would merely remedy practices adjudged unconstitutional by the judiciary.¹³⁷ The Court's standard of review is governed by the "appropriateness" of the legisla-

127. REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 20-29 (the committee specifically cites what it perceives to be Congress' enforcement power under the fourteenth amendment).

128. *See supra* note 12.

129. REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 2-7. *See supra* notes 121-24 and accompanying text.

130. 384 U.S. 641 (1966). *See generally supra* notes 87-99 and accompanying text.

131. *See supra* note 99.

132. This interpretation of the majority opinion in *Morgan* was first declared by Justice Harlan in his dissent. 384 U.S. at 668. In response to the majority's holding that Congress could restrict the use of literacy tests without a showing of discriminatory use, *id.* at 667-68, *see supra* notes 91-93 and accompanying text, Justice Harlan argued that Congress had been given, in effect, "the power to define the *substantive* scope of the [fourteenth] [a]mendment." *Id.* at 668. *See L. TRIBE, supra* note 55, at 267; Sager, *supra* note 99, at 1237.

133. Sager, *supra* note 99, at 1237. Professor Sager argued, however, that such a reading of *Morgan* goes too far. Congress should be properly limited to assisting the Court in fashioning the "contours of elusive constitutional principles like due process and equal protection." *Id.* at 1238.

134. *See supra* notes 69-118 and accompanying text.

135. *See supra* note 91 and accompanying text.

136. *See supra* notes 89-93 and accompanying text.

137. *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966). The framers, in fact, intended to enlarge Congress' power through the fourteenth amendment. *See supra* note 50.

tion.¹³⁸ The Court will not declare the act unconstitutional if the legislation reflects a plausible reading of the Constitution.¹³⁹

This more limited notion of judicial review¹⁴⁰ was expressed by Alexander Hamilton in *Federalist No. 78*.¹⁴¹ In his review of a tripartite form of government,¹⁴² Hamilton characterized the judiciary in relation to the executive and legislative branches, as the most impotent branch, possessing “neither FORCE nor WILL, but merely judgment.”¹⁴³ A pivotal attribute of the Court’s limited, independent form of review,¹⁴⁴ however, is its willingness to declare unconstitutional only that which is inimical to the “manifest tenor of the Constitution;”¹⁴⁵ other-

138. 384 U.S. at 649-50.

139. The issue for the Court becomes whether it can perceive a plausible constitutional basis “upon which Congress might predicate a judgment.” *Id.* at 656. See *Nebbia v. New York*, 291 U.S. 502 (1933): “The guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” *Id.* at 525; L. TRIBE, *supra* note 55, at 271-72; Note, *supra* note 73, at 1273-74, 1276-77.

Professor Cox, although not strictly advocating a completely deferential Court, observed that judicial review is countermajoritarian: a small body of men, appointed for life, is empowered to set aside the will of the elected representatives of the people. This may not be objectionable when the Court is giving effect to a fairly absolute, enduring command rooted either in the words of the Constitution or in years of constitutional tradition. It is objectionable where the Court is simply second-guessing the legislature. . . .

Constitutional Determinations, *supra* note 118, at 210.

140. See generally Wolfe, *A Theory of U.S. Constitutional History*, 43 J. POL. 292 (May, 1981).

141. THE FEDERALIST NO. 78, at 464 (A. Hamilton) (C. Rossiter ed. 1961).

142. Hamilton noted that the executive dispenses honors and holds the sword; the legislature not only controls the purse but also “prescribes rules by which the duties and rights of every citizen are to be regulated.” *Id.* at 465. The Judiciary, on the other hand, “has no influence over either 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.” *Id.*

143. *Id.*

144. Judicial review does not “suppose a superiority of the judicial to the legislative power.” Rather, “[i]t only supposes that the power of the people [as expressed in their constitution] is superior to both.” *Id.* at 467-68.

145. *Id.* at 466. James Bradley Thayer, in his analysis of judicial review, observed that the early “rule of administration” involving the constitutionality of legislation did not void the legislation “unless the violation of the [C]onstitution [was] so manifest as to leave no room for reasonable doubt.” Thayer, *The Origin And Scope of The American Doctrine Of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893) (citation omitted). Thayer collects a number of early cases dealing with judicial review, *id.* at 138-42, to support his conclusion that an act should not be found unconstitutional unless it is “so clear that it is not open to rational question.” *Id.* at 144. See, e.g., *Ogden v. Saunders*, 25 U.S. 213, 254 (1827) (Washington, J.):

“[I]f I could rest my opinion in favour of the constitutionality of the law . . . on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the . . . legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the

wise, there is no basis for making the judiciary a distinct body.¹⁴⁶

The Court's adherence to a rather narrow scope of review is evidenced by the infrequency with which congressional acts were declared unconstitutional prior to the Civil War.¹⁴⁷ Only in *Marbury v. Madison*¹⁴⁸ and *Dred Scott*¹⁴⁹ did the Court exercise its judicial "veto" to defeat an act of Congress. Modern courts, however, have increasingly invalidated congressional legislation.¹⁵⁰ As Judge Learned Hand stated,¹⁵¹ the present concept of the judiciary regards the Court "as a third legislative chamber." Amazingly, this "patent usurpation" of the legislature's role has long remained unchallenged.¹⁵²

constitution is proved beyond all reasonable doubt. This has always been the language of this Court, when that subject has called for its decision."

Id. at 270.

146. THE FEDERALIST NO. 78, *supra* note 141, at 493. When the judiciary substitutes its will for that of the legislature, its need for political independence is dissolved. *Id.*

147. *See infra* notes 148-49.

148. 5 U.S. (1 Cranch) 137 (1803). Part of the Court's decision in *Marbury* dealt with an obscure section of the Judiciary Act of 1789, which attempted to enlarge the jurisdiction of the Supreme Court. *Id.* at 178-80. *See* Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 81. Since article III was silent on the issue, it was argued that congressional expansion, rather than restriction, of the Court's original jurisdiction was within Congress' power. Chief Justice Marshall held to the contrary, establishing the Court as the final interpreter of the Constitution. 5 U.S. (1 Cranch) at 177. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958); G. GUNTHER, *supra* note 57, at 32-35. *See also* Van Alstyne, *A Critical Guide To Marbury v. Madison*, 1969 DUKE L.J. 1.

149. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In this decision, the Court held the Missouri Compromise unconstitutional on the grounds that Congress could not bar slavery in the territories. The Court reasoned that the act would effect a taking of property, that is, slaves, without due process of law. *Id.* at 450. *See also infra* notes 222-26 and accompanying text.

150. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY 249-82 (1977) (court has become much more like a legislative body enacting its own predilections into law); J. BURNHAM, CONGRESS AND THE AMERICAN TRADITION 103-123 (1959) (after 1940, judicial vetoes, like the presidential veto, became routine).

151. L. HAND, THE BILL OF RIGHTS (1958).

152. *Id.* at 42. *See generally* W. WILSON, CONGRESSIONAL GOVERNMENT (1885). Woodrow Wilson believed that "Congress [was] predominant over its so-called coordinate branches. . . . Congressional government [was] the real government of the Union." *Id.* at 52-53. A similar position was taken by James Burnham, who concluded:

Traditionally the American governmental system has been in fact what it has been customarily said to be: a changing equilibrium of dispersed, balancing and conflicting powers. If within that system any one of the diverse elements has traditionally been, on the whole, of relatively more weight than the others, it is, as the formal scheme of the Constitution plainly suggests, the legislature, the Congress. If we have had—or have—any sort of special supremacy, then it has been a congressional supremacy.

J. BURNHAM, *supra* note 150, at 115.

Prior to the passage of the thirteenth, fourteenth and fifteenth amendments, many elder statesmen also argued for a strong legislative voice in interpreting the meaning of the Constitution. Thomas Jefferson believed that:

This deferential approach to congressional power of constitutional explication is not incompatible with the concept of judicial review established in *Marbury v. Madison*.¹⁵³ *Marbury* does not preclude another branch of government from having the final authority to interpret the broad terms of the fourteenth amendment.¹⁵⁴ Judicial review only requires the Court to strike down legislation it views as “repugnant to the [C]onstitution.”¹⁵⁵ *Marbury* does not require the Court, in evaluating the constitutionality of a statute, to discredit all congressional interpretations of the fourteenth amendment that differ from those of the Court. Rather, *Marbury* only requires the congressional interpretation to be reasonable in the opinion of the Court. The deferential standard,

[T]o consider the judges as the ultimate arbiters of all constitutional questions—[is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. . . . The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and cosovereign within themselves.

Letter to William C. Jarvis (Sept. 28, 1820), reprinted in *THE WORKS OF THOMAS JEFFERSON* 161 (Ford ed. 1905).

A similar sentiment was espoused by Abraham Lincoln. Following a presidential campaign in which he advocated a legislative reversal of *Dred Scott*, see *supra* note 149, he stated in his first inaugural address:

[N]or do I deny that such decisions [of the Supreme Court on constitutional law] must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. . . . At the same time . . . if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

6 W. RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 5, 9-10 (1897).

Senator John Bingham, who later authored and introduced the first section of the fourteenth amendment, also expressed the view that:

The judiciary are entitled to respect; but if they arrogate powers not conferred upon them, and attempt by such arrogation of power to take away the legislative power of the whole people. . . . I claim, as a Representative, the right to disregard such assumed authority, and, as a citizen and a man, to appeal from such decision to that final arbiter, the public opinion of the country. . . . [T]he right to question their propriety, to denounce their injustice, and to insist that whatever is wrong . . . be corrected . . . is one of the “powers reserved to the people”.

CONG. GLOBE, 36th Cong., 1st Sess. 1839 (1860). See generally *Hearings on S. 158, supra* note 29, at 639-729 (testimony of Professor Joseph Witherspoon).

153. 5 U.S. (1 Cranch) 137 (1803). See L. TRIBE, *supra* note 55, at 269-70.

154. Gunther, *Judicial Hegemony And Legislative Autonomy: The Nixon Case And The Impeachment Process*, 22 U.C.L.A. L. REV. 30, 34 (1974).

155. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

therefore, preserves the principle of judicial review under *Marbury*.¹⁵⁶

After *Morgan*, the Court in *Jones v. Alfred H. Mayer Co.*¹⁵⁷ endorsed this deferential view of congressional enforcement power. In *Jones*, the Court held that Congress had the power to rationally determine what constituted the “badges and incidents of slavery”¹⁵⁸ under the thirteenth amendment.¹⁵⁹ The Court reasoned that the emancipating purposes of the amendment required a broad construction of the enabling clause.¹⁶⁰ It was therefore necessary that Congress have the power to decide what legislation was appropriate.¹⁶¹

With respect to the Human Life Bill,¹⁶² this traditional view of the congressional enforcement power¹⁶³ legitimates a legislative interpretation of the word “person,” at variance with the Court’s interpretation, if there is a tenable constitutional basis for such a conclusion.¹⁶⁴ The “traditional” Court would limit its inquiry to the “appropriateness” of the legislative finding that “all human beings are persons.”¹⁶⁵ The

156. L. TRIBE, *supra* note 55, at 271-72.

157. 392 U.S. 409 (1968).

158. *Id.* at 440. In this case, the Court was called on to determine the constitutionality of an Act of Congress which provided: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (1976).

159. Congressional enforcement power under the fourteenth amendment has been equated with that under the thirteenth amendment. *See supra* notes 48-49 and accompanying text.

160. 392 U.S. at 440. The Court agreed with Senator Trumbull’s analysis of the breadth of congressional enforcement power:

I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.

CONG. GLOBE, 39th Cong., 1st Sess. 322 (1864).

The Court’s rationale seemingly granted Congress expansive authority to interpret the substantive content of the thirteenth amendment. *See Note, supra* note 107, at 500-05.

161. It is arguable whether the Court is trying to cut back on this expansive interpretation. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976) (inferred that right of free association may limit Congress’ power); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (some private discrimination may be allowed where state does not countenance such action). *See generally* L. TRIBE, *supra* note 55, at 259-61.

162. *See supra* note 12.

163. *See supra* notes 132-52 and accompanying text.

164. *See supra* notes 153-61 and accompanying text.

165. The Court would pursue this analysis by applying the necessary and proper clause standard as it did in *Morgan*. *See supra* notes 96-99 and accompanying text.

Court's examination would address two specific issues. First, should Congress concern itself with what constitutes a person under the fourteenth amendment?¹⁶⁶ Second, is the determination that all human beings are persons constitutionally justifiable?¹⁶⁷

Congress is authorized to enforce the provisions of the thirteenth, fourteenth and fifteenth amendments.¹⁶⁸ If Congress is to fulfill practically its theoretical duty of enforcement, the beneficiaries must be identified.¹⁶⁹ Congress is not merely an advisor to the judiciary,¹⁷⁰ it has the power to determine the scope of those constitutional provisions capable of expansion.¹⁷¹ If, in the interests of racial equality under the thirteenth amendment,¹⁷² it is appropriate for Congress to identify the "incidents and badges of slavery,"¹⁷³ it would seem equally appropriate for Congress to determine the class of individuals whose lives are entitled to protection under the fourteenth amendment.¹⁷⁴

The Court held in *Roe* that, for purposes of the fourteenth amend-

166. See *infra* notes 168-74 and accompanying text. See also *supra* notes 59-60 and accompanying text.

167. See *supra* notes 96, 139 & 155-56 and accompanying text.

168. See *supra* note 5; U.S. CONST. amends. XIII, § 2; XV, § 2. Arguably, the enabling clauses of these amendments empower Congress only to remedy those situations which the Court would find in violation of the Constitution. See Bickel, *supra* note 65, at 97; Sager, *supra* note 99, at 1238; Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405, 442-43 (1973). This limitation was apparently rejected in *Morgan* as too confining. See 384 U.S. at 648-49.

169. Without a focused picture of the scope of protection, it is difficult to enforce the Constitution's guarantees. The primary issue is which governmental body can define the protected group. In answer to this question, Professor Ely noted that "personhood" is really not important:

[T]he argument that fetuses lack constitutional rights is simply irrelevant. For it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person. Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.

Ely, *supra* note 9, at 926 (footnotes omitted) (emphasis in original).

170. *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966). See *supra* notes 95-96 and accompanying text.

171. See *Cohen*, *supra* note 64, at 618-19; *supra* note 99. See also Sager, *supra* note 99, at 1239-42 (approves of congressional extension of fourteenth amendment guarantees but believes Court has already reached outer limits in some areas).

172. See U.S. CONST. amend. XIII.

173. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); see *supra* notes 157-61 and accompanying text.

174. See *Galebach*, *supra* note 28, at 20.

ment, the word “person” does not encompass the unborn.¹⁷⁵ This holding, however, does not preclude a congressional conclusion to the contrary. *Morgan* and *Mitchell* are illustrative of the Court’s willingness to defer to congressional conclusions, especially in “marginal cases.”¹⁷⁶ Although the Court in *Lassiter* ruled that literacy tests would not be held unconstitutional without a clear showing of their discriminatory use,¹⁷⁷ and that states had the constitutional right to impose voter qualification standards implementing such tests,¹⁷⁸ the *Morgan* Court upheld congressional legislation proscribing their use.¹⁷⁹ The Court would deem such legislation constitutional so long as it could “perceive a basis” on which Congress might have acted.¹⁸⁰

Similarly, the findings of the Human Life Bill,¹⁸¹ if enacted, would represent a reasonable interpretation of “person” under the fourteenth amendment,¹⁸² albeit contrary to the Court’s ruling in *Roe*.¹⁸³ The effect of the bill is comparable to that of the act upheld in *Morgan*:¹⁸⁴ both expand the class of persons entitled to fourteenth amendment rights.¹⁸⁵ Furthermore, the bill is no more substantive than the congressional determination¹⁸⁶ of what constituted the “badges and incidents of slavery” in *Jones v. Alfred H. Mayer Co.*¹⁸⁷ The Human Life

175. *Roe v. Wade*, 410 U.S. 113, 158 (1973). See *supra* notes 5-8 & 119-26 and accompanying text.

176. Cohen, *supra* note 64, at 618-19. Professor Cohen notes that Congress is especially well suited to drawing lines in areas of constitutional ambiguities. *Id.* at 619. This is especially appropriate in the area of the fourteenth amendment, which is “cast . . . in such sweeping terms that [its] history does not elucidate [its] contents.” L. HAND, *supra* note 151, at 30. See *supra* notes 155-56 and accompanying text. See generally Galebach, *supra* note 28, at 17.

177. See *supra* notes 74-80 and accompanying text.

178. *Id.*

179. See *supra* notes 92-99 and accompanying text.

180. *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966). See *supra* note 139 and accompanying text.

181. See REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at § 2 (for purposes of the fourteenth amendment the word “person” includes all human beings”).

182. See *infra* note 227 and accompanying text.

183. 410 U.S. at 156-57. See *supra* notes 5-6 and accompanying text.

184. Compare 42 U.S.C. § 1973 4(e) (1976), *supra* note 85, with REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at §§ 1 & 2.

185. Section 4(e) of the 1965 Voting Rights Act expanded non-English speaking citizens’ right to vote. Likewise, the Human Life Bill is a positive piece of legislation. Its purpose is to extend the right to life to the unborn. The fact that it may infringe on a woman’s privacy right is only incidental to this expansion of the right to life. See *infra* note 231. See also *supra* note 169.

186. 392 U.S. 409 (1968).

187. See *supra* notes 157-61 & 168-75 and accompanying text.

Bill provides a similar interpretation of "person" under the protection of the fourteenth amendment.

B. *The Empirical Approach*

A second theory has evolved concerning the conflict between judicial supremacy and congressional enforcement power.¹⁸⁸ Under this theory, the Court's decisions either are the result of constitutional interpretation,¹⁸⁹ in which case legislative judgments play no role in the judicial process, or are based on empirical or factfinding efforts.¹⁹⁰ Legislative judgments concerning the fourteenth amendment are confined to those areas in which legislative findings of fact are germane to judicial determinations.¹⁹¹ When the Court's legal conclusion differs on the basis of the facts presented,¹⁹² the Court will consider, in addition to its own judgment, congressional judgments to the contrary.¹⁹³ This method

188. This theory developed as a response to Justice Harlan's dissent in *Morgan*, 384 U.S. at 659. In his opinion, Justice Harlan claimed that the Court was effectively giving Congress the authority to define the substantive scope of the fourteenth amendment. See *supra* notes 132-39 and accompanying text. He argued that if Congress' section 5 enforcement power was construed this broadly, then it was not clear

why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

384 U.S. at 668.

This theory, known as the "fact finding theory," attempts to limit the areas in which congressional decisions will be deferred to by the Court. See Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 Nw. U. L. REV. 656, 671 (1976); Sager, *supra* note 99, at 1239-40.

189. The absolute, or normative, component reaches the essence of the Court's decision. It concerns the Court's judgment whether or not specific legislation complies with the constitutional standards created by the Court. For example, the Court's holding that a woman has a right to privacy under the fourteenth amendment, *Roe v. Wade*, 410 U.S. 113, 153 (1973), is not subject to a congressional determination that no such right exists. The interpretive aspect of the Court's decision is less vulnerable to change, resting on more abstract reasoning than empirical evidence. Gordon, *supra* note 188, at 671.

190. The empirical component consists of relevant data gathered, debated, and assessed by the legislative body. These "legislative facts" are subject to extrinsic change; for example, whether or not a literacy test has been used in a discriminating fashion. Gordon, *supra* note 188, at 671. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.3 (1979); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952-59 (1955).

191. See *supra* notes 188-90.

192. A court's decision is contingent when it is conditioned on a certain set of facts, an alteration of which would potentially lead to a different decision.

193. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). See *supra* note 86; *infra* notes 200-02 and accompanying text.

compensates for the limited factual data available to the Court in a given case¹⁹⁴ and recognizes the legislature's sophisticated factfinding capabilities.¹⁹⁵ The empirical approach is especially useful in cases involving the deprivation of "liberty" and "due process" where the judicial determination depends on the particular set of facts.¹⁹⁶ A court's decision that rests on constitutional principles exclusive of factual variables, however, is more "absolute" in nature and beyond the purview of the legislature.¹⁹⁷

Considered in this light, *Marbury's* characterization of the Court as

194. Justice Brennan noted that "[t]he nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. . . . Limitations stemming from the nature of the judicial process, however, have no application to Congress." *Oregon v. Mitchell*, 400 U.S. 112, 247-48 (1970) (Brennan, J., concurring in part and dissenting in part). See Emerson, *Toward A General Theory Of The First Amendment*, 72 *YALE L. J.* 877, 913 (1963) (factual determinations are both enormously hard and time consuming and unsuitable for judicial process); Reich, *Mr. Justice Black And The Living Constitution*, 76 *HARV. L. REV.* 673, 740 (1963) (courts have no sources of information other than records before them).

195. See *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting). As Professor Cox noted:

[T]he legislature is, or at least can be, a better fact-finding body than an appellate court. The greater number of members and their varied backgrounds and experience make it virtually certain that the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions than will the typical court. The legislative committee, especially when armed with able counsel and power of subpoena, is better equipped to develop the relevant data. Courts have always found it hard to develop the background facts in constitutional cases.

Constitutional Determinations, *supra* note 118, at 209. See Cox, *supra* note 27, at 107. See also Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 *U. CHI. L. REV.* 28 (1976).

196. *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting) (decisions on due process and equal protection based on empirical foundation, not abstract logic). See Frankfurter, *A Note on Advisory Opinions*, 37 *HARV. L. REV.* 1002, 1004-05 (1924). But see Alfange, *The Relevance Of Legislative Facts In Constitutional Law*, 114 *U. PA. L. REV.* 637 (1966).

197. When, for example, the Court recognizes a new fundamental right or suspect category, the degree of deference paid by the Court is greatly reduced. The identification of constitutionally protected rights, a matter primarily of "constitutional exegesis," would exceed Congress' institutional competence. See Note, *supra* note 73, at 1286.

Justice Harlan, however, has noted that congressional findings in areas where Congress was powerless to act by itself, were nevertheless "entitled to the *most* respectful consideration by the judiciary, coming as it does from a coordinate branch of the government. . . ." *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., concurring in part and dissenting in part) (emphasis added).

Professor Bork expressed this same view in his testimony concerning the 1972 Busing Proposals:

[T]he justices may be persuaded to a different view of a subject by the informal opinion of the legislature. At the very least, a deliberate judgment by Congress on constitutional matters is a powerful brief before the Court. A constitutional role of even such limited dimensions is not to be despised.

the final expositer in "declaring the law"¹⁹⁸ is qualified only by the degree of judicial solicitude toward congressional factual judgments. The Court's function as the sole interpreter of the Constitution is left wholly intact.¹⁹⁹

*South Carolina v. Katzenbach*²⁰⁰ is an example of judicial deference to legislative findings of fact. In that case Congress made extensive factual findings indicating that particular state voting procedures were being used as a means of discrimination.²⁰¹ On the basis of these findings, the Court approved the congressional conclusion that the use of literacy tests as prerequisites for voter registration was an unconstitutional infringement upon the citizens' rights of suffrage.²⁰²

R. BORK, CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS 5-6 (1972), *reprinted in* REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 28.

See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). In *Glidden*, the Court deferred to the congressional judgment that the United States Court of Claims and Courts of Appeals were article III rather than article I courts, *id.* at 541-42, despite two prior decisions holding to the contrary. See *Williams v. United States*, 289 U.S. 553 (1933); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). Although Congress could not overturn by fiat constitutional decisions of the Court, 370 U.S. at 541, its interpretations were entitled to due weight. *Id.* This was especially true where the Court's decision had motivated Congress to investigate the history involved and, as a result, had drawn a contrary conclusion. *Id.* See *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (great weight accorded congressional decisions despite their implicating fundamental rights).

198. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

199. Congress is not purporting to overrule a Court's decision. Rather, it is an invitation to the Court to overrule itself. See REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at § 5 (bill invites judicial review). The Court is admittedly not an infallible judicial body. In *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), Justice Brandeis noted that "in cases involving the Federal Constitution . . . this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning." *Id.* at 406-08 (footnotes omitted). The Court has made mistakes before and, in a number of instances, has corrected them with the aid of the legislative branch. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). See also REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 28; Noonan, *In Re the Human Life Bill*, 7 HUMAN LIFE REV. 65, 72-73 (1981).

200. 383 U.S. 301 (1966). See *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).

201. See *supra* note 86.

202. *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966). See *supra* note 86. Two recent decisions indicate the Court's adoption of this fact-finding approach. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court upheld the constitutionality of the "minority business enterprise" provision of the Public Works Employment Act of 1977. In affirming Congress' authority under the fourteenth amendment's enforcement clause to use racial criteria to remedy the discriminatory distribution of federal funds, *id.* at 476-77, the Court noted the abundant evidence from which Congress could conclude that discrimination had taken place. *Id.* at 477-78.

Likewise, in *City of Rome v. United States*, 446 U.S. 156 (1980), the Court approved Congress' use of its fifteenth amendment enforcement power to prohibit electoral changes which, though not in violation of the fifteenth amendment, had a discriminatory impact. *Id.* at 177. The Court once

Congress similarly exercises its fourteenth amendment enforcement power in the proposed Human Life Bill.²⁰³ Just as Congress may determine that certain voting requirements are used discriminatorily,²⁰⁴ it may also decide the empirical question of when human life biologically originates. By compiling the evidence of experimental research with the testimony of scientific experts,²⁰⁵ Congress may establish a factual basis for the objective determination that life begins at conception.²⁰⁶

again cited the area's history of purposeful discrimination, from which Congress could conclude that the changes at issue were intended to be discriminatory. *Id.*

203. See *infra* notes 204-07 and accompanying text. Under this theory, Congress is limited to finding that "the life of each human being begins at conception." REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at § 1(a). The decision of whether the word "person includes all human beings" for purposes of the fourteenth amendment, *id.* at § 2, concerns the substance of the question left to the Court. Lewis & Rosenberg, *Legal Analysis of Congress' Authority to Enact a Human Life Statute*, CONG. RESEARCH SERVICE 29-30 (1981). See *supra* notes 188-97 and accompanying text.

204. See *supra* notes 200-02 and accompanying text.

205. REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 7-13.

206. Recall that "life" refers to the biological existence of a being. See *supra* note 32. On this premise, Dr. Hymie Gordon, Professor of Medical Genetics and physician at the Mayo Clinic, typified the medical testimony before the Senate subcommittee concerning the existence of "life" before birth.

I think we can now . . . say that the question of the beginning life—when Life begins—is no longer a question for theological or philosophical dispute. It is an established scientific *fact*. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established *fact* that all life, including human life, begins at the moment of conception.

Hearings on S. 158, supra note 29, reprinted in REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 9 (testimony of Dr. Hymie Gordon) (emphasis added).

Dr. Jerome Lejeune, Professor of Fundamental Genetics at the University of Rene Descartes, Paris, France, reiterated

the fact that after fertilization has taken place a new human has come into being is no longer a matter of taste or of opinion. The human nature of the human being from conception to old age is not a metaphysical contention, it is a [matter of] *plain experimental evidence*.

Hearings on S. 158, supra note 29, at 10 (testimony of Dr. Jerome Lejeune) (emphasis added). See also Byrn, *supra* note 59, at 6-15 (no scientific basis for establishing quickening, viability, birth or any event other than conception as the beginning of human life).

It has been argued that Congress need only find a possibility of life to protect against its being taken away. Galebach, *supra* note 28, at 22-23. Congress, however, need not rely on this interpretation of *Morgan*, for there is a "consensus," if that is what is required, see *supra* note 122 and accompanying text, in the scientific community that life begins at conception.

There are potentially conflicting definitions of "conception." From the subcommittee report, it appears that Congress views the fusion of the ovum (female gamete) and spermatozoon (male gamete) at fertilization as the correct scientific definition. See REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 7-9. See generally J. Baker, *The Hatch Amendment: A Legal Analysis* (1981) (unpublished manuscript); Letter from Henry J. Hyde to the Editors of the Washington Post (May 27, 1981), reprinted in 7 HUMAN LIFE REV. 80 (1981).

Such a finding, in the words of Justice Harlan, is entitled to the "most respectful consideration" by the Court.²⁰⁷

IV. A PROPOSED VALUE JUDGMENT

Assuming that human life begins at conception, the Court will have to decide whether every human being is entitled to fourteenth amendment protection.²⁰⁸ In deciding the extent to which the fourteenth amendment protects the unborn, the Court must make a value judgment concerning the intrinsic worth of human life.²⁰⁹ Two standards exist for evaluating "personhood" under the fourteenth amendment. The first is more absolute and is often referred to as the "sanctity of life ethic,"²¹⁰ while the second is a more relativistic "quality of life ethic."²¹¹

Under the "sanctity of life ethic," the judicial standard for "personhood" has three components: viability, humanity, and the possession of being.²¹² Once life is established, an individual is endowed with

207. *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., concurring in part and dissenting in part). See *supra* note 197.

208. See *supra* note 203. How the Court will resolve this issue is unpredictable. What the Court would hold on the basis of the Constitution, what it would hold on the basis of case precedent, and what it would hold on the basis of the facts at issue may not necessarily coincide. *Hearings on S. 158*, *supra* note 29, at 312 (testimony of Professor Robert H. Bork).

209. Once the scientific question of when human life begins is resolved, the next issue is whether that life in its early stages should be accorded the same protection given postnatal life. Recognizing "that it is a constitution we are expounding," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original), which may "draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1957) (referring to what constitutes "cruel and unusual punishment" under the eighth amendment), the Court will have to "supplement the declaration and fill the vacant spaces, by the same processes and methods that have built up the customary law." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (1921). See generally Wolf, *supra* note 140. Thus, the Court is left with a value judgment in deciding whether a fetus has a right to life as defined under the fourteenth amendment. See REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 13-18.

Not everyone believes that value judgments should be left to the Court's discretion. Professor Cox, for one, suggested that although

[t]heoretically, the Court can set outer limits to what the legislature can "reasonably" conclude, . . . where the variety of acceptable justifications is great and the ultimate balance depends as much upon the facts and their characterization as upon ultimate values, the theoretical check has little practical meaning and, if the Court is faithful to the formula, any constitutional limit virtually disappears.

Constitutional Determinations, *supra* note 118, at 211. See Note, *supra* note 73, at 1284.

210. See *infra* notes 212-14 and accompanying text.

211. See *infra* notes 215-18 and accompanying text.

212. In *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court articulated the test for "personhood" as follows: "They are humans, live, and have their being. They are clearly 'persons' within the

certain inalienable rights,²¹³ among them the right to the continuance of life.²¹⁴

Under the "quality of life ethic," the standard for personal existence is imprecise and variable. "Personhood" is subjective, subordinate to fluctuating extrinsic factors surrounding an individual's conception. Commentators and court justices have suggested that the mother's health²¹⁵ and financial situation,²¹⁶ as well as the fetus' physical development²¹⁷ and educational opportunities,²¹⁸ are relevant factors in determining the "meaningfulness" and correlative value of the fetus' existence.

Judicial precedent,²¹⁹ the events surrounding the drafting of the fourteenth amendment,²²⁰ and the intent of its framers²²¹ favor the adoption of the "sanctity of life ethic." Ratification of the fourteenth amendment in 1868 occurred in response to the controversial *Dred*

meaning of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 70 (footnotes omitted). The Court noted in one case that it is immaterial to a discussion of fundamental human rights that *Levy* dealt with illegitimate children who were already born. *See Glona v. American Guarantee Co.*, 391 U.S. 73 (1968). "To say that the test of Equal Protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." *Id.* at 75-76. *See also Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1291 n.216 (1975).

213. The Declaration of Independence para. 2 (U.S. 1776). *See generally* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 144 (1928).

214. *See* REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 13-18.

215. *Doe v. Bolton*, 410 U.S. 179, 192 (1972).

216. In *Beal v. Doe*, 432 U.S. 438 (1977), the Court found that Title XIX of the Social Security Act did not require the funding of nontherapeutic abortions. 432 U.S. at 447. Justice Marshall filed a trenchant dissenting opinion in which he stated that "[i]f funds for an abortion are unavailable, a poor woman . . . may well give up all chance of escaping the cycle of poverty. . . . [S]he will be unable to work so that her family can break out of the welfare system or the lowest income brackets." *Id.* at 458.

217. The development of intrauterine diagnosis of hereditary disease or congenital defect in the fetus, in conjunction with the availability of abortion, has provided what many view as "an acceptable, albeit imperfect, alternative in the prevention of such conditions for many families." NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, ANTENATAL DIAGNOSIS: REPORT OF A CONSENSUS DEVELOPMENT CONFERENCE I-31 (National Institute of Health Pub. No. 70-1973, 1979).

218. *Beal v. Doe*, 432 U.S. 438, 454 (1977) (Marshall, J., dissenting). The lack of available money to fund abortions perpetuates the existence of "unwanted minority and mixed-race children [who] now spend blighted lives in foster homes, orphanages, and 'reform' schools." *Id.* at 456.

219. *See infra* notes 228-30 and accompanying text.

220. *See infra* notes 222-26 and accompanying text.

221. *See infra* note 227.

Scott case.²²² In that decision the Court refused to recognize the equality of blacks under the Declaration of Independence.²²³ Although the plain language of the declaration, that “all men are created equal,” appeared to encompass “the whole human family,”²²⁴ the Court found that blacks were not intended to be included.²²⁵ Consequently, the

222. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).

223. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 409-10 (1857). The Court recognized the values and purposes behind the Declaration of Independence as a means of discovering the framers' intent in delimiting the rights of blacks under the Constitution.

224. *Id.* at 410.

225. *Id.* The Court discussed the laws against mixed marriages enforced at the time of the American Revolution. These laws were intended to create an impenetrable barrier between the white and black races. On this basis, the Court concluded:

[I]t is too clear for dispute, that the enslaved African race were (sic) not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Id.

Not all the justices agreed with the Court's reasoning. Justice McLean advocated looking beyond the practices at the time of the Constitution's framing and to the ideals embodied therein. He wrote:

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic [i.e. the slave trade] which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it became extinct.

Id. at 537-38 (McLean, J., dissenting). See *Hearings On S. 158*, *supra* note 29, at 480-82 (testimony of Professor Victor G. Rosenblum).

At the time of the fourteenth amendment's passage, a strong and successful movement was afoot to protect human beings from the moment of conception. An American Medical Association resolution adopted in 1859 typified the sentiment at the time, “protesting ‘against such unwarrantable destruction of human life,’ calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies ‘in pressing the subject.’” *Roe v. Wade*, 410 U.S. 113, 142 (1973) (quoting 12 *TRANSACTIONS OF THE AM. MED. ASS'N* 28, 78 (1959)).

As a result of this movement, at least 28 of 37 states criminalized abortions prior to quickening at the time of the amendment's ratification. Byrn, *supra* note 59, at 836. See generally J. NOONAN, *THE MORALITY OF ABORTION, LEGAL AND HISTORICAL PERSPECTIVE* (1970); Sauer, *Attitudes to Abortion in America, 1800-1973*, in 28 *POPULATION STUD.* 53 (1974). It has been suggested that

black man was “not a person but a thing” in the eye of the law.²²⁶

The fourteenth amendment, however, was intended to protect the fundamental rights of all human beings, particularly the “weak and the helpless.”²²⁷ The spirit of the amendment comports with Justice Brennan’s conclusion that American society “strongly affirms the sanctity of life”²²⁸ and that the “dignity of the individual is the supreme value.”²²⁹ In fact, to preclude a depreciation of the right to life, the Court has liberally construed those clauses associated with the security of the person.²³⁰ Whether the Court will prove equally attentive in protecting the lives of the unborn is unsettled.²³¹

when the state legislatures ratified the fourteenth amendment on the basis that “all men are created equal,” they were acting on the same principles which motivated the passing of laws to protect the unborn. See REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 26; Byrn, *supra* note 59, at 835-39.

226. *Bailey v. Poindexter*, 55 Va. 132, 142-43 (1858) (citing *Dred Scott* as support).

227. In *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 83 (1938) (Black, J., dissenting), Justice Black, questioned the extension of personhood to corporations, see *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886), and pointed out that “[t]he history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings. . . .” 303 U.S. at 87.

A brief consideration of the legislative history surrounding the fourteenth amendment supports Justice Black’s observation. Congressman Bingham, who drafted section 1 of the amendment, believed that “any human being.” CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866), was “entitled to protection of American law.” CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867). Senator Howard, who introduced the amendment in the Senate, asserted that it applied to “common humanity . . . giv[ing] to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives the most powerful, the most wealthy, or the most haughty.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). See generally Corwin, *supra* note 213.

228. *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

229. *Id.* at 296. In recognition of this principle, at least one court, prior to *Roe*, upheld its state’s antiabortion statute. See *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972).

230. The Court in *Boyd v. United States*, 116 U.S. 616 (1885) stated that “constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as it consisted more in sound than in substance.” *Id.* at 635.

231. One caveat to any analysis involving *Morgan* concerns Justice Brennan’s well known “Ratchet Theory.” 384 U.S. at 651 n.10. Succinctly stated, congressional legislation designed to secure the guarantees of the fourteenth amendment may not “restrict, abrogate, or dilute” equal protection and due process rights previously recognized by the Court. Although the Court has never invoked this theory, some have argued that it precludes the enactment of the Human Life Bill because the Bill would infringe a woman’s right to privacy. See Lewis & Rosenberg, *supra* note 203, at 30. On the other hand, whatever entitlement Congress has to authorize an expansion of fourteenth amendment rights should support a restriction as well. If the relative competence of Congress to make factual findings is the justification for judicial deference to congressional expansion of rights, logical consistency requires similar deference where those rights are restricted. *Constitutional Determinations*, *supra* note 118, at 255. See Cox, *supra* note 27, at 106-07; Note, *supra*

note 107, at 500-05; *Developments: Congressional Power Under Section Five of the Fourteenth Amendment*, 25 STAN. L. REV. 885, 898-903 (1973).

Professor Cohen advanced a more significant objection. Whenever there is an expansion of a right, there is necessarily a contraction of another's right. Cohen, *supra* note 64, at 607-13. There are numerous possibilities for conflicts of this type. See generally Note, *supra* note 73, at 1289 n.155. For example, a statute permitting public demonstrations on private property would arguably dilute the property owner's fourteenth amendment property rights. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980) (state's interest in expanding rights of free speech beyond that of federal Constitution did not work a denial of property without due process of law).

A modified ratchet theory, suggested by Professor Tribe, would limit congressional power to restrict those interests protected by other sections of the Constitution, for example, the Bill of Rights. See L. TRIBE, *supra* note 55, at 272. See *Oregon v. Mitchell*, 400 U.S. 112, 287 (1970) (Stewart, J., concurring in part and dissenting in part) (congressional regulation of interstate commerce may not impinge on Bill of Rights). This analysis, however, would appear to restrict the congressional enforcement power unnecessarily. Often, protected rights are antagonistic to one another, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (defendant's right to a fair trial in opposition to the press' right to publicize), and necessitate a balancing process between the competing interests. To prevent Congress from participating in such a decisionmaking process may result not only in the exclusion of worthy analysis, cf. *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., concurring in part and dissenting in part) (congressional views "entitled to most respectful consideration"), but also may result in the disqualification of the more competent branch of government. See Note, *supra* note 73, at 1287-91. See also Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

Another explanation of the ratchet theory suggests that Congress may vary the remedy available for infringement of an individual's rights but may not alter the right itself. See Burt, *supra* note 65, at 127-31; Monaghan, *supra* note 99, at 26-30. It has been aptly noted, however, that the substance of a right is closely associated with its remedy, the reduction of which may abrogate the right altogether. See Note, *supra* note 73, at 1277.

Possibly the most workable analysis of the ratchet theory focuses on the fundamental purpose of a statute. Where the expansion of a right is the clear intent of the act and the dilution of other rights is only incidental to the act's implementation, the congressional judgment should prevail. *Hearings on S. 158*, *supra* note 29, at 354 (testimony of Professor Basile J. Uddo). This analysis could resolve the problems surrounding the ratchet theory. Brennan's example of an impermissible exercise of the congressional enforcement power authorizing states to establish racially segregated schools, *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), would be invalid since its obvious purpose would be discrimination.

Applying this latter explanation of the ratchet theory to the Human Life Bill, the focus of the analysis should be on the intent of the Congress and the primary effect of the statute; in this case, the expansion of the class of person afforded protection under the fourteenth amendment. When the fundamental decision hinges on a value judgment based on a "quality of life ethic," see *supra* notes 215-18 and accompanying text, the judgment arguably is more a policy choice for Congress than a question of law for the Court. See *Maher v. Roe*, 432 U.S. 464, 479-80 (1977). Where a "decision . . . is fraught with judgments of policy and value over which opinions are sharply divided . . . the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" *Id.* (quoting *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904)). See also Ely, *supra* note 9, at 923-26. See generally Mashaw, *supra* note 195.

CONCLUSION

The right to life is a fundamental human right,²³² well established in American society.²³³ The Supreme Court in *Roe*, however, classified one group of individuals as nonpersons²³⁴ without determining whether its decision failed to protect human life.²³⁵ The Court intimated that its own institutional restrictions might forever preclude judicial determination of when life begins.²³⁶ The Human Life Bill affords Congress the opportunity to resolve this question.²³⁷ Although Congress' conclusion may be at variance with the Court's,²³⁸ the Bill may nevertheless be effective. The Court's opinion can be challenged on the basis of constitutional misinterpretation.²³⁹ A judicial decision derives its validity from the rigor of its reasoning.²⁴⁰ When the public becomes enlightened by a more humane justice, the Constitution may acquire a deeper meaning,²⁴¹ and the Court will bow to the force of congressional judgment.²⁴² The Human Life Bill suggests an alternative reading of

232. See The Declaration of Independence para. 2 (U.S. 1776); *supra* notes 222-30 and accompanying text.

233. See *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

234. *Roe v. Wade*, 410 U.S. 113, 157-58 (1973).

235. See *id.* at 159; *supra* notes 5-7 & 119-26 and accompanying text.

236. *Roe v. Wade*, 410 U.S. at 159.

237. See *supra* notes 162-87 & 203-08 and accompanying text.

238. Compare *supra* notes 5-7 and accompanying text with REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at §§ 1, 2.

239. Chief Justice Taney, who was later to author the *Dred Scott* opinion, see *supra* notes 222-26 and accompanying text, recognized that the Court is not an infallible body; rather, it is "the law of [the] [C]ourt that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded on error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." *Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, J., dissenting). See *Gliddon Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting); *Hearings on S. 158*, *supra* note 29, at 319-27 (testimony of Professor Robert F. Nagel); *supra* notes 197 & 199.

240. See *supra* note 239.

241. *Weems v. United States*, 217 U.S. 349, 378 (1910) (Court specifically addressed what constituted cruel and 'unusual punishment under eighth and fourteenth amendments). See *Furman v. Georgia*, 408 U.S. 238, 277 (1972) (Brennan, J., concurring) (society's rejection of severe punishment indicates it does not comport with human dignity). If society's opinion is of any worth in interpreting the Constitution, and it is questionable whether it is, see *supra* note 122, it may be of interest that one public opinion poll found 75% of the public opposed to the availability of abortion on demand. *Gallup Poll: Attitudes on Abortion*, *The Times-Picayune/The States-Item*, Aug. 28, 1980, § 3, at 3, col. 1. Cf. J. NOONAN, *supra* note 125, at 69-79 (criticizes blatant proabortion bias of news media and pollsters).

242. See *supra* note 239.

the fourteenth amendment.²⁴³ Whether the Court will adopt such an interpretation is unclear.²⁴⁴ What is clear, however, is that such a bill is within the ambit of congressional authority to secure the right to life,²⁴⁵ “the first and only legitimate object of good government.”²⁴⁶

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243. The Human Life Bill proposes an alternative to the Supreme Court's holding in *Roe* that the fetus is not a “person” under the fourteenth amendment. *See Roe v. Wade*, 410 U.S. 113, 157-58 (1973). *See also supra* notes 5-8 & 119-26 and accompanying text.

244. *See supra* note 209 and accompanying text.

245. At least the determination that human life begins at conception is within the congressional enforcement power, *see supra* notes 204-07 and accompanying text, if not the decision that every human being is a person for purposes of the fourteenth amendment. *See supra* notes 162-87 and accompanying text.

246. Address by Thomas Jefferson (March 31, 1809), *reprinted in* J. BARTLETT, *FAMILIAR QUOTATIONS* 472-73 (14th ed. 1968), *cited in* REPORT ON THE HUMAN LIFE BILL, *supra* note 12, at 2.